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All laws specifically codified by the General Assembly of the State of Georgia through the 2012 Regular Session of the General Assembly.

Annotations of Judicial Decisions:

Case annotations reflecting decisions posted to LexisNexis® through March 30, 2012. These annotations will appear in the following traditional reporter sources: Georgia Reports; Georgia Appeals Reports; Southeastern Reporter; Supreme Court Reporter; Federal Reporter; Federal Supplement; Federal Rules Decisions; Lawyers' Edition; United States Reports; and Bankruptcy Reporter.

Annotations of Attorney General Opinions:

Constructions of the Official Code of Georgia Annotated, prior Codes of Georgia, Georgia Laws, the Constitution of Georgia, and the Constitution of the United States by the Attorney General of the State of Georgia posted to LexisNexis® through March 30, 2012.

Other Annotations:

References to:

Emory Bankruptcy Developments Journal.
Emory International Law Review.
Emory Law Journal.
Georgia Journal of International and Comparative Law.
Georgia Law Review.
Georgia State University Law Review.
Mercer Law Review.
Georgia State Bar Journal.
Georgia Journal of Intellectual Property Law.
American Jurisprudence, Second Edition.
American Jurisprudence, Pleading and Practice.
American Jurisprudence, Proof of Facts.
American Jurisprudence, Trials.
Corpus Juris Secundum.
Uniform Laws Annotated.
American Law Reports, First through Sixth Series.
American Law Reports, Federal.

Tables:

In Volume 41, a Table Eleven-A comparing provisions of the 1976 Constitution of Georgia to the 1983 Constitution of Georgia and a Table Eleven-B comparing provisions of the 1983 Constitution of Georgia to the 1976 Constitution of Georgia.

An updated version of Table Fifteen which reflects legislation through the 2012 Regular Session of the General Assembly.

Indices:

A cumulative replacement index to laws codified in the 2012 supplement pamphlets and in the bound volumes of the Code.

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TITLE 16

CRIMES AND OFFENSES

VOLUME 14

Chap.

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VOLUME 14B

Law reviews. — For note, "Seen But Not Heard: An Argument for Granting Evidentiary Hearings to Weigh the Credibility of Recanted Testimony," see 46 Ga. L. Rev. 213 (2011).

CHAPTER 7

DAMAGE TO AND INTRUSION UPON PROPERTY

Article 1
Burglary

ARTICLE 1

BURGLARY

16-7-1. Burglary.

(a) As used in this Code section, the term:

(1) "Dwelling" means any building, structure, or portion thereof which is designed or intended for occupancy for residential use.

(2) "Railroad car" shall also include trailers on flatcars, containers on flatcars, trailers on railroad property, or containers on railroad property.

(b) A person commits the offense of burglary in the first degree when, without authority and with the intent to commit a felony or theft therein, he or she enters or remains within an occupied, unoccupied, or vacant dwelling house of another or any building, vehicle, railroad car, watercraft, aircraft, or other such structure designed for use as the dwelling of another. A person who commits the offense of burglary in the first degree shall be guilty of a felony and, upon conviction thereof, shall be punished by imprisonment for not less than one nor more than 20 years. Upon the second conviction for burglary in the first degree, the defendant shall be guilty of a felony and shall be punished by imprisonment for not less than two nor more than 20 years. Upon the third and all subsequent convictions for burglary in the first degree, the defendant shall be guilty of a felony and shall be punished by imprisonment for not less than five nor more than 25 years.

(c) A person commits the offense of burglary in the second degree when, without authority and with the intent to commit a felony or theft therein, he or she enters or remains within an occupied, unoccupied, or vacant building, structure, vehicle; railroad car, watercraft, or aircraft. A person who commits the offense of burglary in the second degree shall be guilty of a felony and, upon conviction thereof, shall be punished by imprisonment for not less than one nor more than five years. Upon the second and all subsequent convictions for burglary in the second degree, the defendant shall be guilty of a felony and shall be punished by imprisonment for not less than one nor more than eight years.

(d) Upon a fourth and all subsequent convictions for a crime of burglary in any degree, adjudication of guilt or imposition of sentence shall not be suspended, probated, deferred, or withheld. (Laws 1833, Cobb's 1851 Digest, p. 790; Ga. L. 1858, p. 98, § 1; Code 1863, §§ 4283, 4285; Ga. L. 1865-66, p. 232, § 2; Ga. L. 1866, p. 151, § 1; Ga. L. 1868, p. 16, § 1; Code 1868, §§ 4320, 4322; Code 1873, §§ 4386, 4388; Ga. L. 1878-79, p. 65, §§ 1, 2; Code 1882, §§ 4386, 4388; Penal Code 1895, §§ 149, 150; Penal Code 1910, §§ 146, 147; Code 1933, §§ 26-2401, 26-2402; Code 1933, § 26-1601, enacted by Ga. L. 1968, p. 1249, § 1; Ga. L. 1977, p. 895, § 1; Ga. L. 1978, p. 236, § 1; Ga. L. 1980, p. 770, § 1; Ga. L. 2012, p. 899, § 3-1/HB 1176.)

The 2012 amendment, effective July 1, 2012, rewrote this Code section, which read: "(a) A person commits the offense of burglary when, without authority and with the intent to commit a felony or theft therein, he enters or remains within the dwelling house of another or any building, vehicle, railroad car, watercraft, or other such structure designed for use as the dwelling of another or enters or remains within any other building, railroad car, aircraft, or any room or any part thereof. A person convicted of the offense of burglary, for the first such offense, shall be punished by imprisonment for not less than one nor more than 20 years. For the purposes of this Code section, the term 'railroad car' shall also include trailers on flatcars, containers on flatcars, trailers on railroad property, or containers on railroad property.

"(b) Upon a second conviction for a crime of burglary occurring after the first conviction, a person shall be punished by imprisonment for not less than two nor more than 20 years. Upon a third conviction for the crime of burglary occurring after the first conviction, a person shall be punished by imprisonment for not less than five nor more than 20 years. Adjudication of guilt or imposition of sentence shall not be suspended, probated, deferred, or withheld for any offense punishable under this subsection." See editor's note for applicability.

Code Commission notes. — Pursuant to Code Section 28-9-5, in 2012, "more than" was substituted for "more that" in the next-to-last sentence of subsection (b).

Editor's notes. — Ga. L. 2012, p. 899, § 9-1(a)/HB 1176, not codified by the General Assembly, provides: "This Act shall become effective on July 1, 2012, and shall apply to offenses which occur on or after that date. Any offense occurring before July 1, 2012, shall be governed by the statute in effect at the time of such offense and shall be considered a prior conviction for the purpose of imposing a sentence that provides for a different penalty for a subsequent conviction for the same type of offense, of whatever degree or level, pursuant to this Act."

JUDICIAL DECISIONS

Analysis

General Consideration

Evidence sufficient for delinquency adjudication.

Evidence was sufficient to adjudicate a child delinquent for the adult crime of burglary under O.C.G.A. § 16-7-1 based on a neighbor's testimony that the neighbor saw the child tampering with and opening the victim's back door and the child's admission that the child "cracked" the door. That day, it was discovered that money and video games were taken from the victim. In the Interest of R. H., 313 Ga. App. 416, 721 S.E.2d 628 (2011).

Elements of Burglary

2. Unauthorized Entry

Affirmative defenses.

Because a defendant's evidence that the defendant acted under a misapprehension of fact in entering a house would have authorized the jury to acquit the defendant of burglary under O.C.G.A. § 16-7-1(a), and because the charge that was given did not properly inform the jury about the true nature of the defendant's affirmative defense, the defendant was entitled to a charge on mistake of fact under O.C.G.A. § 16-3-5. Price v. State, 289 Ga. 459, 712 S.E.2d 828 (2011).

Entry into store. — Evidence was sufficient to convict a defendant of burglarizing a tool supply store, because the defendant's blood was found on the smashed-in door and the defendant had two prior convictions for strikingly similar hardware store burglaries. Although the evidence was circumstantial, there was no other evidence of how the defendant's blood could have been at the scene. The trial court's definition of "entry" as entry on to real estate was not error or if error was not harmful, because the charge as a whole required that the defendant enter the building. Roberts v. State, 309 Ga. App. 681, 710 S.E.2d 878 (2011).

3. Intent

Sufficient evidence of intent.

Evidence that the defendant and another were carrying stolen items toward a police officer's car and that they dropped the items and ran when they realized it was a police car, despite the officer shouting at them to stop, was sufficient to convict the defendant of burglary and obstruction of justice in violation of O.C.G.A. §§ 16-7-1(a) and 16-10-24(a). Mitchell v. State, 312 Ga. App. 293, 718 S.E.2d 126 (2011).

Jury Instructions

Charge on criminal trespass as lesser included offense.

Because there was no written request, the trial court did not err by failing to instruct the jury on criminal trespass as a lesser included offense of burglary Boatright v. State, 289 Ga. 597, 713 S.E.2d 829 (2011).

Refusal to charge mistake of fact. — Trial court did not err in failing to charge the jury on the defense of mistake of fact under O.C.G.A. § 16-3-5 as to the burglary counts of the indictment because the fact that the defendant could have thought that someone lived in the home did not constitute the type of mistake of fact that would serve as a defense to the defendant's unauthorized entry into the home since the evidence was uncontroverted that the defendant was not invited into the home. Boatright v. State, 289 Ga. 597, 713 S.E.2d 829 (2011).

Inferences and Sufficiency and Admissibility of Evidence

Fingerprint evidence.

Juvenile's fingerprint, which was found on a bottle of tonic water at the crime scene, was sufficient evidence to support the adjudication of the juvenile as delinquent for committing burglary in violation of O.C.G.A. § 16-7-1, and the juvenile's alternative hypothesis that the juvenile earlier touched the bottle while the bottle was in the stream of commerce before the victim purchased the bottle was not plausible. In the Interest of H. A., 311 Ga. App. 660, 716 S.E.2d 768 (2011).

Sufficient evidence for conviction.

Evidence that a defendant was seen riding a bicycle after midnight while carrying a tire iron and a black saw case and wearing a new leather tool belt around the defendant's waist, along with the defendant's own statement that the defendant had been working at the address later determined to have been broken into and

a tool belt and saw taken, was sufficient to convict the defendant of burglary under O.C.G.A. § 16-7-1, although the defendant fled from police and the stolen items were not recovered. Wilcox v. State, 310 Ga. App. 382, 713 S.E.2d 468 (2011).

Because the defendant admitted entry into a home, the defendant's statement to a witness, and the victim's in-court identification of the defendant supported the defendant's conviction of armed robbery and burglary under O.C.G.A. §§ 16-7-1(a) and 16-8-41(a), the jury could find that a conspiracy existed without regard to a coconspirator's statements under O.C.G.A. § 24-3-5. Lewis v. State, 311 Ga. App. 54, 714 S.E.2d 732 (2011).

Evidence was sufficient to support the defendant's conviction for burglary, under O.C.G.A. § 16-7-1(a), because: (1) the perpetrator of a crime entered just before closing time a fast-food restaurant with a gun and directed the employees into a room, a cooler, and a freezer; (2) the perpetrator took money from the restaurant, shot one of the employees, and left the scene in the employee's car; (3) one of the employees telephoned relatives with a cell phone and told the relatives what was happening; (4) the relatives called the police, came to the restaurant, and saw the perpetrator drive away; (5) money, a gun, and discarded clothing was recovered from the car or the area where the perpetrator fled on foot; (6) a police officer, who was pursuing the perpetrator, was wounded in an altercation with the perpetrator when the officer's gun discharged; (7) when the defendant later surrendered to the police, DNA from the officer's blood was found on the defendant's chest; and (8) the employees, the relatives, and the officer identified the defendant, a former employee of the restaurant who was fired days before the crime, as the perpetrator. Donald v. State, 312 Ga. App. 222, 718 S.E.2d 81 (2011).

Evidence was sufficient to convict a defendant of burglary in violation of O.C.G.A. § 16-7-1(a) because the defendant was caught within four minutes of the burglary in a truck matching the victims' description of the truck outside their home, and the defendant was carrying a crowbar, had the victims' television, and fled from police. Veasley v. State, 312 Ga. App. 728, 719 S.E.2d 585 (2011).

Evidence was sufficient for a rational factfinder to find the defendant guilty beyond a reasonable doubt of false imprisonment, O.C.G.A. § 16-5-41(a), burglary, O.C.G.A. § 16-7-1(a), and aggravated assault, O.C.G.A. § 16-5-21(a)(2), because although the defendant argued that there was insufficient credible and admissible evidence to show that the defendant was the victim's attacker, determinations of witness credibility and the weight to give the evidence presented was solely within the province of the jury; defense counsel thoroughly cross-examined the victim, the responding officers, and the investigator regarding the victim's demeanor after the attack, the victim's description of the attack and the attacker, and the inconsistencies between what the victim told each of them. Pennington v. State, 313 Ga. App. 764, 723 S.E.2d 13 (2012).

Sentencing

Multiple convictions.

Trial court did not err in sentencing the defendant as a recidivist because the records of an Alabama conviction showed that the defendant pled guilty to the offense of burglary in the third degree and received a sentence of four years imprisonment; the elements of the crime as charged in the Alabama indictment were similar to the elements required to commit the crime under O.C.G.A. § 16-7-1. Wells v. State, 313 Ga. App. 528, 722 S.E.2d 133 (2012).

Trial court did not err by correcting the court's written sentence to conform with the court's oral pronouncement because the trial court was authorized to correct the clerical error appearing in the court's written sentence as compared to the court's original oral pronouncement; the trial court, after reviewing the original transcript, determined that the court's original pronouncement and intent was for the aggravated battery and burglary counts to be served consecutive to each other as well as to the other aggravated battery count. Griggs v. State, 314 Ga. App. 158, 723 S.E.2d 480 (2012).

ARTICLE 2

CRIMINAL TRESPASS AND DAMAGE TO PROPERTY

PART 1

GENERAL PROVISIONS

16-7-21. Criminal trespass.

JUDICIAL DECISIONS

ANALYSIS

Elements of Crime

Notice not to enter to be given by owner or rightful occupant.

Defendant's conviction for criminal trespass was reversed even though the evidence was that, pursuant to a divorce decree, defendant was prohibited from being on the property of the ex-spouse's work place until further order of the court because there was no evidence that the ex-spouse was the rightful occupant of the premises or that the rightful owner gave defendant prior notice. Sheehan v. State, 314 Ga. App. 325, 723 S.E.2d 724 (2012).

Evidence and Corroboration

Evidence sufficient for conviction.

Because there was evidence to support each fact necessary to make out the state's case, the jury was authorized to find that the defendant was guilty beyond a reasonable doubt of family violence battery, O.C.G.A. § 16-5-23.1, criminal trespass, O.C.G.A. § 16-7-21, and abuse of an elder person, O.C.G.A. § 30-5-8; the victim's recollection of what occurred on the night at issue was contradicted by the victim's contemporaneous statements to neighbors and the police, as well as the victim's statements to the daughter the next morning that the defendant had grabbed the victim by the arm and twisted the arm, thereby causing the wound and other bruises. Laster v. State, 311 Ga. App. 360, 715 S.E.2d 768 (2011).

Evidence that a defendant possessed a cell phone, a debit card, and women's jewelry, all of which had been stolen a day earlier, while the defendant attempted to climb into a stranger's home, along with evidence that the defendant attempted to flee when caught climbing in the window, was sufficient to support convictions for criminal trespass and felony theft by receiving stolen property in violation of O.C.G.A. §§ 16-7-21(b)(1) and 16-8-7(a). Reese v. State, 313 Ga. App. 746, 722 S.E.2d 441 (2012).

Application

Warrantless arrest of hotel guest proper. — Exigent circumstances authorized an officer's warrantless arrest of a hotel guest for criminal trespass because the offense was committed in the officer's presence when the guest refused the officer's request to leave the hotel. Thus, the guest's false imprisonment claim against the hotel was properly dismissed on summary judgment. Lewis v. Ritz Carlton Hotel Co., LLC, 310 Ga. App. 58, 712 S.E.2d 91 (2011).

Probable cause to arrest hotel guest. — As a police officer, acting with the authority and direction of a hotel, notified a guest to depart the hotel due to the guest's unruly behavior, but the guest did not depart, the officer had probable cause to arrest the guest for criminal trespass. Therefore, the guest's false imprisonment claim against the hotel was properly dismissed on summary judg-

ment. Lewis v. Ritz Carlton Hotel Co., LLC, 310 Ga. App. 58, 712 S.E.2d 91 (2011).

Evidence sufficient to support delinquency.

While the evidence was insufficient under O.C.G.A. § 16-7-23(a)(1) to conclude that a juvenile damaged property at a mobile home park in excess of $500, the evidence was sufficient to support a conviction for criminal trespass to property under O.C.G.A. § 16-7-21(a) as a lesser-included offense of second-degree criminal damage to property. In re A. C. R-M, 311 Ga. App. 848, 717 S.E.2d 344 (2011).

16-7-22. Criminal damage to property in the first degree.

JUDICIAL DECISIONS

Proper predicate for possession of a firearm during the commission of a felony. — Offense of criminal damage to property in the first degree, pursuant to O.C.G.A. § 16-7-22(a)(1), involves a person, and thus may serve as a predicate for a conviction for possession of a firearm during the commission of a felony under O.C.G.A. § 16-11-106(b)(1). Craft v. State, 309 Ga. App. 698, 710 S.E.2d 891 (2011).

16-7-23. Criminal damage to property in the second degree.

JUDICIAL DECISIONS

Criminal trespass is lesser included offense.

While the evidence was insufficient under O.C.G.A. § 16-7-23(a)(1) to conclude that a juvenile damaged property at a mobile home park in excess of $500, the evidence was sufficient to support a conviction for criminal trespass to property under O.C.G.A. § 16-7-21(a) as a lesser-included offense of second-degree criminal damage to property. In re A. C. R-M, 311 Ga. App. 848, 717 S.E.2d 344 (2011).

16-7-24. Interference with government property.

JUDICIAL DECISIONS

Jury charge on proximate cause proper. — In a defendant's trial for interference with government property in violation of O.C.G.A. § 16-7-24(a), a trial court did not err in instructing the jury on proximate cause because the statute had no requirement that the defendant intend to cause the damage to the property. That a police officer may fall into the water and damage the officer's equipment was a reasonably probable consequence of the defendant's resisting arrest and struggling with the officer at the side of a swimming pool. Harrison v. State, 313 Ga. App. 861, 722 S.E.2d 774 (2012).

ARTICLE 3

ARSON AND EXPLOSIVES

16-7-60. Arson in the first degree.

JUDICIAL DECISIONS

ANALYSIS

EVIDENCE

Evidence

Evidence sufficient to sustain conviction.

Evidence was sufficient to support convictions for arson because: (1) one of the defendants placed dozens of calls from the decedent's cell phone as the defendants traveled from Tampa to Atlanta in the decedent's pickup truck; (2) the truck was destroyed in a fire that was started through the use of an accelerant near an apartment complex where the defendants were staying with relatives; (3) the decedent's body was found in the bed of the truck; (4) the decedent had been dead for days before the fire; (5) personal belongings of the decedent were found in the possession of the defendants; and (6) the defendants gave statements to the police. Miller v. State, 289 Ga. 854, 717 S.E.2d 179 (2011).

16-7-61. Arson in the second degree.

JUDICIAL DECISIONS

Evidence held sufficient

Evidence was sufficient to support conviction for arson because: (1) one of the defendants placed dozens of calls from the decedent's cell phone as the defendants traveled from Tampa to Atlanta in the decedent's pickup truck; (2) the truck was destroyed in a fire that was started through the use of an accelerant near an apartment complex where the defendants were staying with relatives; (3) the decedent's body was found in the bed of the truck; (4) the decedent had been dead for days before the fire; (5) personal belongings of the decedent were found in the possession of the defendants; and (6) the defendants gave statements to the police. Miller v. State, 289 Ga. 854, 717 S.E.2d 179 (2011).

ARTICLE 4

BOMBS, EXPLOSIVES, AND CHEMICAL AND BIOLOGICAL WEAPONS

16-7-80. Definitions.

JUDICIAL DECISIONS

Homemade device was destructive device. — Homemade device that was constructed from a metal pipe, a cap on one end, with a bolt to serve as a detonator or firing pin, and into which the defendant had loaded a shotgun shell, and which the defendant used in an attempt to intimidate two victims into paying the defendant money was a destructive device within the meaning of O.C.G.A.

§§ 16-7-80(4) and 16-7-88(a). Mason v. State, 312 Ga. App. 723, 719 S.E.2d 581 (2011).

16-7-85. Hoax devices.

JUDICIAL DECISIONS

Evidence sufficient for conviction. — Any rational trier of fact could find the defendant guilty beyond a reasonable doubt of terroristic threats, O.C.G.A. § 16-11-37(a), hoax devices, O.C.G.A. § 16-7-85(a), and armed robbery, O.C.G.A. § 16-8-41(a), because although circumstantial, the evidence authorized the jury to exclude every reasonable hypothesis other than that the defendant engaged in the acts that constituted the crimes; even though the defendant was apprehended while wearing clothing that did not match that described by the victims, an officer familiar with the habits of bank robbers testified that bank robbers like to wear multi-layer clothing and then shed clothes after the crime. Williams v. State, 312 Ga. App. 22, 717 S.E.2d 532 (2011).

16-7-88. Possessing, transporting, or receiving explosives or destructive devices with intent to kill, injure, or intimidate individuals or destroy public buildings; sentencing; enhanced penalties.

JUDICIAL DECISIONS

Separate victims. — In a prosecution under O.C.G.A. § 16-7-88(a), a defendant may be convicted separately for possession of a destructive device with the intent to intimidate as to each individual victim who was the specific target of such intent. Mason v. State, 312 Ga. App. 723, 719 S.E.2d 581 (2011).

Possession of destructive device offense did not merge with aggravated assault. — Defendant's aggravated assault convictions and the defendant's possession of a destructive device convictions did not merge because the possession offense required that the weapon function in a certain way and have certain dimensions, and the assault offense required that the victim was conscious of the risk of immediately receiving a violent injury by use of an offensive weapon. Because each offense required proof of a fact not required for the other, there was no merger under the required evidence test. Mason v. State, 312 Ga. App. 723, 719 S.E.2d 581 (2011).

Homemade device was destructive device. — Homemade device that was constructed from a metal pipe, a cap on one end, with a bolt to serve as a detonator or firing pin, and into which defendant had loaded a shotgun shell, and which the defendant used in an attempt to intimidate two victims into paying the defendant money was a destructive device within the meaning of O.C.G.A. §§ 16-7-80(4) and 16-7-88(a). Mason v. State, 312 Ga. App. 723, 719 S.E.2d 581 (2011).

CHAPTER 8

OFFENSES INVOLVING THEFT

ARTICLE 1

THEFT

16-8-2. Theft by taking.

JUDICIAL DECISIONS

Analysis

General Consideration
Intent
Evidence and Inferences
Jury Instructions

General Consideration

Evidence sufficient to establish venue. — Evidence was sufficient to establish venue beyond a reasonable doubt and to sustain the defendant's conviction for theft by taking because the state established that the defendant wrote checks at a company's county office, the amount of the check cashed exceeded the amount entered into the computer register, and the total amount of the difference was more than $500; the company president testified that the company was located in the county where the defendant's trial was held and that the defendant worked at the company office and then began working from home. Gautreaux v. State, 314 Ga. App. 103, 722 S.E.2d 915 (2012).

Decline in value of stock not a theft. — Taxpayers' complaint for a refund was dismissed, as they were not entitled to a theft loss deduction under 26 U.S.C. § 165(e) with respect to a decline in value of publicly traded stock after the taxpayer husband exercised his stock options because they did not show that they were victims of either a theft by taking, theft by deception, theft by conversion, or theft of services under O.C.G.A. §§ 16-8-2, 16-8-3, 16-8-4, or 16-8-5. The taxpayers were only entitled to capital loss deductions under 26 U.S.C. § 2511. Schroerlucke v. United States, 100 Fed. Cl. 584 (Fed. Cl. 2011).

State failed to show value of jewelry exceeded $500. — State failed to establish that the value of stolen jewelry exceeded $500 as required for felony theft by taking. There was evidence that the rings were part of an entire lot of jewelry — including necklaces, bracelets, rings, and pendants — that the victim had previously purchased from the pawn shop for $10,000. The only evidence related to the specific items taken by the defendant showed that the defendant pawned nine rings for $275. Schneider v. State, 312 Ga. App. 504, 718 S.E.2d 833 (2011).

Indictment sufficient.

Accusation that alleged that the defen-

dant took "drugs the property of Dr. Bob Lanier having a value of less than $500 with the intention of depriving said owner of said property" was sufficient to allege theft by taking under O.C.G.A. § 16-8-2. State v. Meeks, 309 Ga. App. 855, 711 S.E.2d 403 (2011).

Intent

Intent not shown. — Taxpayers were not entitled to a theft loss under 26 U.S.C. § 165(e) with respect to a decline in value of publicly traded stock, as a theft by taking did not occur under O.C.G.A. § 16-8-2 because a corporation did not unlawfully take or appropriate any property from the taxpayer, and there was no evidence of any intention by the corporation or its executives to deprive the taxpery of the property at issue. Although corporate stock, which was in the taxpayer's control after he exercised his stock options, subsequently declined in value, there was no evidence that the corporate executives had any specific intent with regard to the taxpayer to take or appropriate his stock by devaluation or by any other means; rather, the goal of the corporation, including its later-convicted executives, was to increase the value of the stock, including any stock owned and controlled by the taxpayer. Schroerlucke v. United States, 100 Fed. Cl. 584 (Fed. Cl. 2011).

Evidence and Inferences

Trial court did not err in sustaining objection to cross-examination. — Trial court did not abuse the court's discretion in sustaining the state's objection to the defendant's cross-examination of a company president regarding the president's efforts to reduce tax liability because the defendant never testified that the defendant was being rewarded for helping the president minimize tax liability, and some of the questions to which the state objected related to tax advice the president received from the president's accounting firm, which would have shed no light on the defendant's actions. Gautreaux v. State, 314 Ga. App. 103, 722 S.E.2d 915 (2012).

Evidence sufficient to support conviction.

Rational trier of fact was authorized to find that the evidence was sufficient to exclude every reasonable hypothesis except that of the defendant's guilt and to conclude beyond a reasonable doubt that the defendant was guilty of theft by taking, O.C.G.A. § 16-8-2, because there was evidence that the defendant was alone for 20 minutes or more on the floor of the house where the money was kept and where no cleaning was to be performed; while there was circumstantial evidence that also implicated another house cleaner, reasonable jurors could have found from the evidence that the hypothesis that the house cleaner took the money was excluded based on testimony that the defendant had been alone in the area of the house where the money was kept, and there was no such evidence regarding the house cleaner. Cookston v. State, 309 Ga. App. 708, 710 S.E.2d 900 (2011).

Evidence was sufficient to convict a defendant of theft by taking from the defendant's employer based on an investigator's testimony that the defendant stole a box of 50 new golf club heads from the employer. The fact that the employer was aware of the planned theft and allowed the theft to proceed did not constitute consent to the taking. Baker v. State, 311 Ga. App. 532, 716 S.E.2d 580 (2011).

Evidence was sufficient to support the defendant's conviction for theft by taking, under O.C.G.A. § 16-8-2, because: (1) the perpetrator of a crime entered just before closing time a fast-food restaurant with a gun and directed the employees into a room, a cooler, and a freezer; (2) the perpetrator took money from the restaurant, shot one of the employees, and left the scene in the employee's car; (3) one of the employees telephoned relatives with a cell phone and told them what was happening; (4) the relatives called the police, came to the restaurant, and saw the perpetrator drive away; (5) money, a gun, and discarded clothing was recovered from the car or the area where the perpetrator fled on foot; (6) a police officer, who was pursuing the perpetrator, was wounded in an altercation with the perpetrator when the officer's gun discharged; (7) when the defendant later surrendered to the police, DNA from the officer's blood was found on

the defendant's chest; and (8) the employees, the relatives, and the officer identified the defendant, a former employee of the restaurant who was fired days before the crime, as the perpetrator. Donald v. State, 312 Ga. App. 222, 718 S.E.2d 81 (2011).

Theft by taking motor vehicle.

In a juvenile's adjudication as delinquent for theft by taking the juvenile's sister's car, although the juvenile admitted taking the car, the state failed to prove venue and failed to prove that the taking was unlawful as required by O.C.G.A. § 16-8-2. The officer's testimony that the sister said the taking was without the sister's permission was inadmissible hearsay and was insufficient to support the adjudication even though the evidence was admitted without objection. In the Interest of E.C., 311 Ga. App. 549, 716 S.E.2d 601 (2011).

Evidence that a defendant showed an interest in a car that was for sale and took a test drive and returned the car, that the car was stolen the next day, that the defendant was found driving the car hours after the car was stolen using a duplicate key, and that the defendant fled from an officer was sufficient to authorize the defendant's conviction for theft by taking (automobile) in violation of O.C.G.A. § 16-8-2(a). Kelly v. State, 313 Ga. App. 582, 722 S.E.2d 175 (2012).

Jury Instructions

Instruction to infer guilt based on recent possession.

While the evidence was sufficient to support the defendant's conviction of theft by taking of a motor vehicle under O.C.G.A. § 16-8-2, the trial court's jury charge—regarding an inference arising from the defendant's recent possession of a stolen truck—effectively shifted the burden of persuasion to the defendant in violation of the due process clause; the error was not harmless as the error applied to an element of the crime that was at issue in the trial: whether the defendant was the person who stole the truck. Ward v. State, 312 Ga. App. 609, 718 S.E.2d 915 (2011).

Charge not warranted.

Evidence did not support a charge on theft by taking, O.C.G.A. § 16-8-2, as a lesser included offense of robbery by sudden snatching, O.C.G.A. § 16-8-40(a)(3), because the evidence showed that the victim was conscious of the crime as the crime was being committed; even if the victim did not actually see the defendant pick up the wallet, when the victim saw the defendant running toward the exit of a store with the wallet the victim gave chase but was unable to stop the defendant. Brown v. State, 309 Ga. App. 511, 710 S.E.2d 674 (2011).

16-8-3. Theft by deception.

JUDICIAL DECISIONS

Analysis

General Consideration

Venue.

Evidence was sufficient to establish venue in Hall County for a theft by deception charge because a witness testified that at the defendant request, the witness placed a check in the mailbox at a rental house, and that occurred the same day defendant cashed the check; the police officer who responded to the witness's call testified that the house was located in Hall County. Forrester v. State, No. A11A2343, 2012 Ga. App. LEXIS 301 (Mar. 19, 2012).

Application

Evidence sufficient to support conviction.

Evidence was sufficient to support the defendant's conviction for theft by deception in violation of O.C.G.A. § 16-8-3(a)

because the evidence showed that at a motel the defendant obtained payment for a stolen laptop after representing the laptop to be marketable and not stolen. Fields v. State, 310 Ga. App. 455, 714 S.E.2d 45 (2011).

Sufficient evidence supported the defendant's theft by deception convictions as there was no requirement that the state prove the value of the work done; the state presented adequate proof that there was a contract price, that the defendant received money under the terms of the contract, that the defendant did not intend to perform all of the contracted services, and that the defendant did not return the money. Stratacos v. State, 312 Ga. App. 783, 720 S.E.2d 256 (2011).

Offense involves dishonesty or false statement and admissible in child molestation trial. — Defendant's prior convictions for felony forgery, O.C.G.A. § 16-9-1(a), misdemeanor theft by deception, O.C.G.A. § 16-8-3(a), and misdemeanor giving a false name to a law enforcement officer, O.C.G.A. § 16-10-25, were all less than 10 years old and involved dishonesty or false statements. Therefore, those convictions were admissible in the defendant's child molestation trial under O.C.G.A. § 24-9-84.1(b). Damerow v. State, 310 Ga. App. 530, 714 S.E.2d 82 (2011).

Decline in value of stock not a theft. — Taxpayers' complaint for a refund was dismissed, as they were not entitled to a theft loss deduction under 26 U.S.C. § 165(e) with respect to a decline in value of publicly traded stock after the taxpayer husband exercised his stock options because they did not show that they were victims of either a theft by taking, theft by deception, theft by conversion, or theft of services under O.C.G.A. §§ 16-8-2, 16-8-3, 16-8-4, or 16-8-5. The taxpayers were only entitled to capital loss deductions under 26 U.S.C. § 2511. Schroerlucke v. United States, 100 Fed. Cl. 584 (Fed. Cl. 2011).

No theft by deception in financier's actions. — After plaintiff limited liability company (LLC1), who sold its interest in another limited liability company (LLC2) to the other members in LLC2 (buyers), and alleged that the buyers defrauded LLC1's members to sign a deed conveying real property from a related leasing company to LLC2 and that the defendant financier, who financed the buyers, aided and abetted a breach of the buyers' fiduciary duty under O.C.G.A. § 14-11-305(1) in connection with that conveyance, the aiding and abetting claim failed because the conveyance had been required for LLC2 to obtain a loan from a bank, and absent the conveyance to enable LLC2 to secure the debt to the bank, the representations of the selling members in the loan application would have been false, subjecting the selling members to liability for bank fraud under 18 U.S.C. § 1344 or theft by deception under O.C.G.A. § 16-8-3. Ledford v. Peeples, 657 F.3d 1222 (11th Cir. 2011).

Jury Charges

Claim of right defense instruction not available. — Trial court properly did not instruct the jury, sua sponte under O.C.G.A. § 5-5-24(c), on a claim of right defense under O.C.G.A. § 16-8-10 to theft by deception charges under O.C.G.A. § 16-8-3 as a sole defense as the defendant did not object to the instructions given, and a claim of right defense was not warranted as the sole defense as the defendant testified about the reasons the defendant was prevented from completing the jobs, and that the defendant had composed a list with the defendant's pastor of how much work was done on each job, and how much the defendant owed the people. Stratacos v. State, 312 Ga. App. 783, 720 S.E.2d 256 (2011).

16-8-4. Theft by conversion.

JUDICIAL DECISIONS

ANALYSIS

APPLICATION

Application

Decline in value of stock not a theft. — Taxpayers' complaint for a refund was dismissed, as they were not entitled to a theft loss deduction under 26 U.S.C. § 165(e) with respect to a decline in value of publicly traded stock after the taxpayer husband exercised his stock options because they did not show that they were victims of either a theft by taking, theft by deception, theft by conversion, or theft of services under O.C.G.A. §§ 16-8-2, 16-8-3, 16-8-4, or 16-8-5. The taxpayers were only entitled to capital loss deductions under 26 U.S.C. § 2511. Schroerlucke v. United States, 100 Fed. Cl. 584 (Fed. Cl. 2011).

16-8-5. Theft of services.

JUDICIAL DECISIONS

Evidence not sufficient. — Taxpayers' complaint for a refund was dismissed, as they were not entitled to a theft loss deduction under 26 U.S.C. § 165(e) with respect to a decline in value of publicly traded stock after the taxpayer husband exercised his stock options because they did not show that they were victims of either a theft by taking, theft by deception, theft by conversion, or theft of services under O.C.G.A. §§ 16-8-2, 16-8-3, 16-8-4, or 16-8-5. The taxpayers were only entitled to capital loss deductions under 26 U.S.C. § 2511. Schroerlucke v. United States, 100 Fed. Cl. 584 (Fed. Cl. 2011).

16-8-7. Theft by receiving stolen property.

JUDICIAL DECISIONS

ANALYSIS

General Consideration

Venue proper.

State clearly demonstrated that venue was proper in Dawson County, Georgia for the defendant's trial for misdemeanor theft by receiving, O.C.G.A. § 16-8-7, where the defendant began driving away in a vehicle containing stolen goods. Dixson v. State, 313 Ga. App. 379, 721 S.E.2d 555 (2011).

Indictment sufficient.

There was no fatal variance between the allegations of theft by receiving and the proof because evidence that the defendant was the original thief was not uncontested; the direct and uncontested evidence did not identify the defendant as the original thief, and while an accomplice testified that the defendant was involved in shoplifting the items, the defendant was not with the accomplice and the codefendant when an officer saw them concealing clothing. Dixson v. State, 313 Ga. App. 379, 721 S.E.2d 555 (2011).

Elements of Crime

Knowledge that goods have been stolen.

Evidence that a defendant possessed a cell phone, a debit card, and women's jewelry, all of which had been stolen a day earlier, while the defendant attempted to climb into a stranger's home, along with evidence that the defendant attempted to flee when caught climbing in the window, was sufficient to support convictions for criminal trespass and felony theft by receiving stolen property in violation of O.C.G.A. §§ 16-7-21(b)(1) and 16-8-7(a). Reese v. State, 313 Ga. App. 746, 722 S.E.2d 441 (2012).

Application

Evidence sufficient to sustain conviction.

Defendant's conviction for theft by receiving stolen property was supported by the evidence as the state did not rely solely upon mere possession of a stolen dirt bike to support the state's case, but presented additional evidence from which the jury could infer that the defendant knew or should have known that the bike was stolen, specifically, evidence that the brand new dirt bike had been physically abused in a manner inconsistent with ownership in a 24-hour period and that the dirt bike had been borrowed from an alleged friend with an unknown last name who disappeared after the defendant's arrest. Ridgeway v. State, 310 Ga. App. 6, 712 S.E.2d 84 (2011).

Evidence corroborating an accomplice's testimony was sufficient to authorize the jury's determination that the defendant was guilty beyond a reasonable doubt of theft by receiving because in addition to the accomplice's testimony, a deputy with the county sheriff's office observed the accomplice and a codefendant appear to shoplift at a store, after which they got into the defendant's car; the defendant did not stop when police were chasing the defendant but instead continued to drive evasively while the codefendant threw items out of the passenger window, and there were no receipts showing that the items had been purchased. Dixson v. State, 313 Ga. App. 379, 721 S.E.2d 555 (2011).

Evidence was sufficient to sustain the codefendants' convictions for theft by receiving stolen property and conspiracy to commit theft by receiving stolen property since the testimony was sufficient to show that items of value, owned by someone other than the codefendants, were recovered from a warehouse over which the codefendants had control. A witness's misstatements concerning the specific address of the warehouse did not render the evidence insufficient as to the location from where the stolen property was recovered. Robinson v. State, 312 Ga. App. 736, 719 S.E.2d 601 (2011).

Evidence was sufficient to support the defendant's conviction for felony theft by receiving stolen property in violation of O.C.G.A. § 16-8-7(a) because the jury was authorized to find that a ruby and diamond ring exceeding $500 in value had been stolen from the victim's house, that the defendant had acquired possession of it the ring, and that the defendant knew or should have known the ring was stolen; although the defendant asserted that the ring found in the defendant's possession did not belong to the victim, that was a question for the jury as the trier of fact, and the jury had no obligation to believe the defendant's claim. Hogues v. State, 313 Ga. App. 717, 722 S.E.2d 430 (2012).

There was insufficient evidence to show that the defendant was guilty of theft, etc.

Evidence was insufficient to support the defendant's convictions for theft by receiving stolen property, O.C.G.A. § 16-8-7(a), because there was uncontroverted direct evidence that the defendant was the original thief, and no evidence identified any other person other than the defendant; there were video and still photographs, clearly revealing the defendant's unobstructed face and body from several angles, depicting the defendant as the taker of the property; not the receiver. Fields v. State, 310 Ga. App. 455, 714 S.E.2d 45 (2011).

16-8-10. Affirmative defenses to prosecution for violation of Code Sections 16-8-2 through 16-8-7.

JUDICIAL DECISIONS

Denial not affirmative defense.

Trial court properly did not instruct the jury, sua sponte under O.C.G.A. § 5-5-24(c), on a claim of right defense under O.C.G.A. § 16-8-10 to theft by deception charges under O.C.G.A. § 16-8-3 as a sole defense as the defendant did not object to the instructions given, and a claim of right defense was not warranted as the sole defense as the defendant testi-

fied about the reasons the defendant was prevented from completing the jobs, and that the defendant had composed a list with the defendant's pastor of how much work was done on each job, and how much the defendant owed the people. Stratacos v. State, 312 Ga. App. 783, 720 S.E.2d 256 (2011).

16-8-11. Venue for purposes of Code Sections 16-8-2 through 16-8-9 and 16-8-13 through 16-8-15.

JUDICIAL DECISIONS

Venue was proper in the county, etc.

Evidence was sufficient to establish venue in Hall County for a theft by deception charge because a witness testified that at the defendant's request, the witness placed a check in the mailbox at a rental house, and that occurred the same day defendant cashed the check; the police officer who responded to the witness's call testified that the house was located in Hall County. Forrester v. State, No. A11A2343, 2012 Ga. App. LEXIS 301 (Mar. 19, 2012).

Establishment of venue.

State clearly demonstrated that venue was proper in Dawson County, Georgia for the defendant's trial for misdemeanor theft by receiving, O.C.G.A. § 16-8-7, where the defendant began driving away in a vehicle containing stolen goods. Dixson v. State, 313 Ga. App. 379, 721 S.E.2d 555 (2011).

Evidence was sufficient to establish venue beyond a reasonable doubt and to sustain the defendant's conviction for theft by taking because the state established that the defendant wrote checks at a company's county office, the amount of the check cashed exceeded the amount entered into the computer register, and the total amount of the difference was more than $500; the company president testified that the company was located in the county where the defendant's trial was held and that the defendant worked at the company office and then began working from home. Gautreaux v. State, 314 Ga. App. 103, 722 S.E.2d 915 (2012).

16-8-12. Penalties for theft in violation of Code Sections 16-8-2 through 16-8-9.

(a) A person convicted of a violation of Code Sections 16-8-2 through 16-8-9 shall be punished as for a misdemeanor except:

(1)(A) If the property which was the subject of the theft exceeded $24,999.99 in value, by imprisonment for not less than two nor more than 20 years;

(B) If the property which was the subject of the theft was at least $5,000.00 in value but was less than $25,000.00 in value, by imprisonment for not less than one nor more than ten years and, in the discretion of the trial judge, as for a misdemeanor;

(C) If the property which was the subject of the theft was at least $1,500.01 in value but was less than $5,000.00 in value, by imprisonment for not less than one nor more than five years and, in the discretion of the trial judge, as for a misdemeanor; and

(D) If the defendant has two prior convictions for a violation of Code Sections 16-8-2 through 16-8-9, upon a third conviction or

subsequent conviction, such defendant shall be guilty of a felony and shall be punished by imprisonment for not less than one nor more than five years and, in the discretion of the trial judge, as for a misdemeanor;

(2) If the property was any amount of anhydrous ammonia, as defined in Code Section 16-11-111, by imprisonment for not less than one nor more than ten years, a fine not to exceed the amount provided by Code Section 17-10-8, or both;

(3) If the property was taken by a fiduciary in breach of a fiduciary obligation or by an officer or employee of a government or a financial institution in breach of his or her duties as such officer or employee, by imprisonment for not less than one nor more than 15 years, a fine not to exceed the amount provided by Code Section 17-10-8, or both;

(4) If the crime committed was a violation of Code Section 16-8-2 and if the property which was the subject of the theft was a memorial to the dead or any ornamentation, flower, tree, or shrub placed on, adjacent to, or within any enclosure of a memorial to the dead, by imprisonment for not less than one nor more than three years. Nothing in this paragraph shall be construed as to cause action taken by a cemetery, cemetery owner, lessee, trustee, church, religious or fraternal organization, corporation, civic organization, or club legitimately attempting to clean, maintain, care for, upgrade, or beautify a grave, gravesite, tomb, monument, gravestone, or other structure or thing placed or designed for a memorial of the dead to be a criminal act;

(5)(A) The provisions of paragraph (1) of this subsection notwithstanding, if the theft or unlawful activity was committed in violation of subsection (b) of Code Section 10-1-393.5 or in violation of subsection (b) of Code Section 10-1-393.6 or while engaged in telemarketing conduct in violation of Chapter 5B of Title 10, by imprisonment for not less than one nor more than ten years or, in the discretion of the trial judge, as for a misdemeanor; provided, however, that any person who is convicted of a second or subsequent offense under this paragraph shall be punished by imprisonment for not less than one year nor more than 20 years.

(B) Subsequent offenses committed under this paragraph, including those which may have been committed after prior felony convictions unrelated to this paragraph, shall be punished as provided in Code Section 17-10-7;

(6)(A) As used in this paragraph, the term:

(i) "Destructive device" means a destructive device as such term is defined by Code Section 16-7-80.

(ii) "Explosive" means an explosive as such term is defined by Code Section 16-7-80.

(iii) "Firearm" means any rifle, shotgun, pistol, or similar device which propels a projectile or projectiles through the energy of an explosive.

(B) If the property which was the subject of the theft offense was a destructive device, explosive, or firearm, by imprisonment for not less than one nor more than ten years;

(7) If the property which was the subject of the theft is a grave marker, monument, or memorial to one or more deceased persons who served in the military service of this state, the United States of America or any of the states thereof, or the Confederate States of America or any of the states thereof, or a monument, plaque, marker, or memorial which is dedicated to, honors, or recounts the military service of any past or present military personnel of this state, the United States of America or any of the states thereof, or the Confederate States of America or any of the states thereof, and if such grave marker, monument, memorial, plaque, or marker is privately owned or located on privately owned land, by imprisonment for not less than one nor more than three years if the value of the property which was the subject of the theft is $1,000.00 or less, and by imprisonment for not less than three years and not more than five years if the value of the property which was the subject of the theft is more than $1,000.00;

(8) If the property that was the subject of the theft was a vehicle engaged in commercial transportation of cargo or any appurtenance thereto, including, without limitation, any such trailer, semitrailer, container, or other associated equipment, or the cargo being transported therein or thereon, by imprisonment for not less than three years nor more than ten years, a fine not less than $5,000.00 nor more than $50,000.00, and, if applicable, the revocation of the defendant's commercial driver's license in accordance with Code Section 40-5-151, or any combination of such penalties. For purposes of this paragraph, the term "vehicle" includes, without limitation, any railcar; or

(9) Notwithstanding the provisions of paragraph (1) of this subsection, if the property of the theft was regulated metal property, as such term is defined in Code Section 10-1-350, and the sum of the aggregate amount of such property, in its original and undamaged condition, plus any reasonable costs which are or would be incurred in the repair or the attempt to recover any property damaged in the theft or removal of such regulated metal property, exceeds $500.00, by imprisonment for not less than one nor more than five years, a fine of not more than $5,000.00, or both.

(b) Except as otherwise provided in paragraph (5) of subsection (a) of this Code section, any person who commits the offense of theft by deception when the property which was the subject of the theft exceeded $500.00 in value and the offense was committed against a person who is 65 years of age or older shall, upon conviction thereof, be punished by imprisonment for not less than five nor more than ten years.

(c) Where a violation of Code Sections 16-8-2 through 16-8-9 involves the theft of a growing or otherwise unharvested commercial agricultural product which is being grown or produced as a crop, such offense shall be punished by a fine of not less than $1,000.00 and not more than the maximum fine otherwise authorized by law. This minimum fine shall not in any such case be subject to suspension, stay, or probation. This minimum fine shall not be required in any case in which a sentence of confinement is imposed and such sentence of confinement is not suspended, stayed, or probated; but this subsection shall not prohibit imposition of any otherwise authorized fine in such a case. (Code 1933, § 26-1812, enacted by Ga. L. 1968, p. 1249, § 1; Ga. L. 1972, p. 841, § 4; Ga. L. 1978, p. 1457, § 1; Ga. L. 1981, p. 1552, § 1; Ga. L. 1981, p. 1576, § 1; Ga. L. 1982, p. 1371, § 2; Ga. L. 1984, p. 900, § 3; Ga. L. 1986, p. 1228, § 1; Ga. L. 1992, p. 6, § 16; Ga. L. 1994, p. 359, § 1; Ga. L. 1996, p. 231, § 4; Ga. L. 1996, p. 416, § 4; Ga. L. 1997, p. 1507, § 4; Ga. L. 1998, p. 643, § 5; Ga. L. 2000, p. 1085, § 3; Ga. L. 2001, p. 1153, § 2; Ga. L. 2003, p. 177, § 1; Ga. L. 2004, p. 1072, § 2; Ga. L. 2006, p. 329, § 1/HB 1275; Ga. L. 2007, p. 650, § 4/SB 203; Ga. L. 2009, p. 731, § 4/SB 82; Ga. L. 2012, p. 112, § 1-2/HB 872; Ga. L. 2012, p. 899, § 3-2/HB 1176.)

The 2012 amendments. — The first 2012 amendment, effective July 1, 2012, substituted "regulated metal property, as such term is" for "ferrous metals or regulated metal property, as such terms are" near the beginning of paragraph (a)(9). See editor's note for applicability. The second 2012 amendment, effective July 1, 2012, in subsection (a), designated the existing provisions of paragraph (a)(1) as subparagraph (a)(1)(A) and, in subparagraph (a)(1)(A), substituted "$24,999.99 in value, by imprisonment for not less than two nor more than 20 years" for "$500.00 in value, by imprisonment for not less than one nor more than ten years or, in the discretion of the trial judge, as for a misdemeanor"; added subparagraphs (a)(1)(B) through (a)(1)(D); deleted "if the property which was the subject of the theft was a motor vehicle or was a motor vehicle part or component which exceeded $100.00 in value or" following "subsection notwithstanding," near the beginning of subparagraph (a)(5)(A); in paragraph (a)(7), twice substituted "$1,000.00" for "$300.00"; in paragraph (a)(8), added a comma following "including" in the first sentence, added a comma following "limitation" in the first and second sentences, and added a comma following "includes" in the second sentence; and substituted "$1,000.00" for "$500.00" in the first sentence of subsection (c). See editor's note for applicability.

Editor's notes. — Ga. L. 2012, p. 112, § 4-1(a)/HB 872, not codified by the General Assembly, provides, in part, that the amendment of this Code section shall apply to all offenses committed on or after July 1, 2012.

Ga. L. 2012, p. 899, § 9-1(a)/HB 1176, not codified by the General Assembly, provides: "This Act shall become effective on

July 1, 2012, and shall apply to offenses which occur on or after that date. Any offense occurring before July 1, 2012, shall be governed by the statute in effect at the time of such offense and shall be considered a prior conviction for the purpose of imposing a sentence that provides for a different penalty for a subsequent conviction for the same type of offense, of whatever degree or level, pursuant to this Act."

JUDICIAL DECISIONS

ANALYSIS

General Consideration

Illustrative cases.

Evidence was sufficient to support the defendant's conviction for felony theft by receiving stolen property in violation of O.C.G.A. § 16-8-7(a) because the jury was authorized to find that a ruby and diamond ring exceeding $ 500 in value had been stolen from the victim's house, that the defendant had acquired possession of the ring, and that the defendant knew or should have known the ring was stolen; although the defendant asserted that the ring found in the defendant's possession did not belong to the victim, that was a question for the jury as the trier of fact, and the jury had no obligation to believe the defendant's claim. Hogues v. State, 313 Ga. App. 717, 722 S.E.2d 430 (2012).

Value

Proof of value of stolen property.

Evidence from a plant employee that golf club heads stolen by an employee cost $203 each wholesale and that their value was $203 each was sufficient for the trial court to determine that the value of the items stolen at the time and place of the theft exceeded $500 for purposes of sentencing under O.C.G.A. § 16-8-12(a)(1). Baker v. State, 311 Ga. App. 532, 716 S.E.2d 580 (2011).

State failed to establish that the value of stolen jewelry exceeded $500 as required for felony theft by taking. There was evidence that the rings were part of an entire lot of jewelry — including necklaces, bracelets, rings, and pendants — that the victim had previously purchased from the pawn shop for $10,000. The only evidence related to the specific items taken by the defendant showed that the defendant pawned nine rings for $275. Schneider v. State, 312 Ga. App. 504, 718 S.E.2d 833 (2011).

Evidence from a theft victim as to the value of a stolen cell phone and items of jewelry that the victim or the victim's spouse had purchased was sufficient to establish that the stolen items' value exceeded $ 500 and was sufficient to support a felony sentence. Reese v. State, 313 Ga. App. 746, 722 S.E.2d 441 (2012).

16-8-14. Theft by shoplifting.

(a) A person commits the offense of theft by shoplifting when such person alone or in concert with another person, with the intent of appropriating merchandise to his or her own use without paying for the same or to deprive the owner of possession thereof or of the value thereof, in whole or in part, does any of the following:

(1) Conceals or takes possession of the goods or merchandise of any store or retail establishment;

(2) Alters the price tag or other price marking on goods or merchandise of any store or retail establishment;

(3) Transfers the goods or merchandise of any store or retail establishment from one container to another;

(4) Interchanges the label or price tag from one item of merchandise with a label or price tag for another item of merchandise; or

(5) Wrongfully causes the amount paid to be less than the merchant's stated price for the merchandise.

(b)(1) A person convicted of the offense of theft by shoplifting, as provided in subsection (a) of this Code section, when the property which was the subject of the theft is $500.00 or less in value shall be punished as for a misdemeanor; provided, however, that:

(A) Upon conviction of a second offense for shoplifting, where the first offense is either a felony or a misdemeanor, as defined by this Code section, in addition to or in lieu of any imprisonment which might be imposed, the defendant shall be fined not less than $500.00, and the fine shall not be suspended or probated;

(B) Upon conviction of a third offense for shoplifting, where the first two offenses are either felonies or misdemeanors, or a combination of a felony and a misdemeanor, as defined by this Code section, in addition to or in lieu of any fine which might be imposed, the defendant shall be punished by imprisonment for not less than 30 days or confinement in a "special alternative incarceration-probation boot camp," probation detention center, diversion center, or other community correctional facility of the Department of Corrections for a period of 120 days or shall be sentenced to monitored house arrest for a period of 120 days and, in addition to either such types of confinement, may be required to undergo psychological evaluation and treatment to be paid for by the defendant; and such sentence of imprisonment or confinement shall not be suspended, probated, deferred, or withheld; and

(C) Upon conviction of a fourth or subsequent offense for shoplifting, where the prior convictions are either felonies or misdemeanors, or any combination of felonies and misdemeanors, as defined by this Code section, the defendant commits a felony and shall be punished by imprisonment for not less than one nor more than ten years; and the first year of such sentence shall not be suspended, probated, deferred, or withheld.

(2) A person convicted of the offense of theft by shoplifting, as provided in subsection (a) of this Code section, when the property which was the subject of the theft exceeds $500.00 in value commits a felony and shall be punished by imprisonment for not less than one nor more than ten years.

(3) A person convicted of the offense of theft by shoplifting, as provided in subsection (a) of this Code section, when the property

which was the subject of the theft is taken from three separate stores or retail establishments within one county during a period of seven days or less and when the aggregate value of the property which was the subject of each theft exceeds $500.00 in value, commits a felony and shall be punished by imprisonment for not less than one nor more than ten years.

(4) A person convicted of the offense of theft by shoplifting, as provided in subsection (a) of this Code section, when the property which was the subject of the theft is taken during a period of 180 days and when the aggregate value of the property which was the subject of each theft exceeds $500.00 in value, commits a felony and shall be punished by imprisonment for not less than one nor more than ten years.

(c) In all cases involving theft by shoplifting, the term "value" means the actual retail price of the property at the time and place of the offense. The unaltered price tag or other marking on property, or duly identified photographs thereof, shall be prima-facie evidence of value and ownership of the property.

(d) Subsection (b) of this Code section shall in no way affect the authority of a sentencing judge to provide for a sentence to be served on weekends or during the nonworking hours of the defendant as provided in Code Section 17-10-3, relative to punishment for misdemeanors. (Ga. L. 1957, p. 115, §§ 1, 3; Code 1933, § 26-1802.1, enacted by Ga. L. 1978, p. 2257, § 2; Ga. L. 1983, p. 457, § 1; Ga. L. 1997, p. 1394, § 1; Ga. L. 1998, p. 578, § 1; Ga. L. 2000, p. 870, § 1; Ga. L. 2012, p. 899, § 3-3/HB 1176.)

The 2012 amendment, effective July 1, 2012, in the introductory paragraph of subsection (a), substituted "such person" for "he" near the beginning and inserted "or her" near the middle; substituted "$500.00" for "$300.00" in paragraphs (b)(1) and (b)(2); substituted "$500.00" for "$250.00" in subparagraph (b)(1)(A); in paragraph (b)(3), inserted "the aggregate value of" near the middle and substituted "$500.00" for "$100.00"; and added paragraph (b)(4). See editor's note for applicability.

Editor's notes. — Ga. L. 2012, p. 899, § 9-1(a)/HB 1176, not codified by the General Assembly, provides: "This Act shall become effective on July 1, 2012, and shall apply to offenses which occur on or after that date. Any offense occurring before July 1, 2012, shall be governed by the statute in effect at the time of such offense and shall be considered a prior conviction for the purpose of imposing a sentence that provides for a different penalty for a subsequent conviction for the same type of offense, of whatever degree or level, pursuant to this Act."

JUDICIAL DECISIONS

Recidivist sentence improper. — Trial court erred in sentencing the defendant as a recidivist to 10 years imprisonment under O.C.G.A. § 17-10-7 for theft by shoplifting in violation of O.C.G.A. § 16-8-14 because the defendant demonstrated that the trial court did not exercise the court's discretion to consider pro-

bating or suspending a portion of the sentence after the defendant served one year pursuant to § 16-8-14(b)(1)(C). Holland v. State, 310 Ga. App. 623, 714 S.E.2d 126 (2011).

Evidence sufficient to support conviction.

Trial court did not err in denying the codefendant's motion for directed verdict as to the codefendant's conviction for felony theft by shoplifting because in addition to an accomplice's testimony, and the testimony from a store employee that the retrieved items were valued at more than $400, the codefendant's furtive behavior observed by a deputy in the store and the act of tossing clothing from the passenger window of a car were all evidence from which a jury could reasonably infer the codefendant's guilt. Dixson v. State, 313 Ga. App. 379, 721 S.E.2d 555 (2011).

Trial court did not err in denying the codefendant's motion for directed verdict as to the codefendant's conviction for misdemeanor theft by shoplifting because no corroboration of accomplice testimony was necessary to support a misdemeanor conviction. Dixson v. State, 313 Ga. App. 379, 721 S.E.2d 555 (2011).

16-8-16. Theft by extortion.

ADVISORY OPINIONS OF THE STATE BAR

Committing offense results in Rules of Professional Conduct violation. — If an attorney were to indicate to an officer that as a result of the attorney's position as a member of the city council a favorable recommendation as to one of the attorney's clients would result in benefits flowing to the officer, or that an unfavorable recommendation would result in harm, the attorney would have committed the offense of bribery, O.C.G.A. § 16-10-2(a)(1), or extortion, O.C.G.A. § 16-8-16(a)(4). The attorney would also have violated Rule 3.5(a) of the Georgia Rules of Professional Conduct. Adv. Op. No. 05-12 (July 25, 2006).

16-8-17. Misuse of Universal Product Code labels.

(a)(1) Except as provided in paragraph (2) of this subsection, a person who, with intent to cheat or defraud a retailer, possesses, uses, utters, transfers, makes, alters, counterfeits, or reproduces a retail sales receipt or a Universal Product Code label which results in a theft of property which exceeds $500.00 in value commits a felony and shall be punished by imprisonment for not less than one nor more than three years or by a fine or both.

(2) A person convicted of a violation of paragraph (1) of this subsection, when the property which was the subject of the theft resulting from the unlawful use of retail sales receipts or Universal Product Code labels is taken from three separate stores or retail establishments within one county during a period of seven days or less and when the aggregate value of the property which was the subject of each theft exceeds $500.00 in value, commits a felony and shall be punished by imprisonment for not less than one nor more than ten years.

(b) A person who, with intent to cheat or defraud a retailer, possesses 15 or more fraudulent retail sales receipts or Universal Product Code labels or possesses a device the purpose of which is to manufacture

fraudulent retail sales receipts or Universal Product Code labels shall be guilty of a felony and punished by imprisonment for not less than one nor more than ten years. (Code 1981, § 16-8-17, enacted by Ga. L. 2000, p. 870, § 2; Ga. L. 2001, p. 4, § 16; Ga. L. 2012, p. 899, § 3-4/HB 1176.)

The 2012 amendment, effective July 1, 2012, substituted "$500.00" for "$300.00" near the end of paragraph (a)(1); near the end of paragraph (a)(2), inserted "aggregate value of the" and substituted "$500.00" for "$100.00"; and substituted "shall" for "will" near the end of subsection (b). See editor's note for applicability.

Editor's notes. — Ga. L. 2012, p. 899, § 9-1(a)/HB 1176, not codified by the General Assembly, provides: "This Act shall become effective on July 1, 2012, and shall apply to offenses which occur on or after that date. Any offense occurring before July 1, 2012, shall be governed by the statute in effect at the time of such offense and shall be considered a prior conviction for the purpose of imposing a sentence that provides for a different penalty for a subsequent conviction for the same type of offense, of whatever degree or level, pursuant to this Act."

16-8-18. Entering automobile or other motor vehicle with intent to commit theft or felony.

JUDICIAL DECISIONS

Evidence sufficient for conviction. Evidence was sufficient to convict a defendant of theft in violation of O.C.G.A. § 16-8-18 as a party to the crime under O.C.G.A. § 16-2-20, given that the defendant drove the defendant's truck to a pharmacy, waited with the truck idling while the defendant's friend got out, smashed a car window, and stole a purse, then drove away with the friend and hid the friend at the defendant's apartment when the police came. Rinks v. State, 313 Ga. App. 37, 718 S.E.2d 359 (2011).

Attempt to enter an automobile did not merge with loitering. — Merging of sentences for attempt to enter an automobile in violation of O.C.G.A. §§ 16-4-1 and 16-8-18, and loitering under O.C.G.A. § 16-11-36 was not warranted because loitering required proof of presence in a place at a time or in a manner not usual for law-abiding individuals, and attempt to enter an automobile required performance of an act which constituted a substantial step toward the commission of entering an automobile, both elements not required by the other crime. Brown v. State, 312 Ga. App. 489, 718 S.E.2d 847 (2011).

Defendant's act of repeatedly pulling at a vehicle's door handle in a sorority house parking lot at 2:00 A.M. amounted to more than a mere preparatory act, and was instead an act proximately leading to the consummation of the crime of entering an automobile, supporting the defendant's conviction for attempt to enter an automobile in violation of O.C.G.A. §§ 16-4-1 and 16-8-18. Brown v. State, 312 Ga. App. 489, 718 S.E.2d 847 (2011).

16-8-21. Removal or abandonment of shopping carts.

(a) As used in this Code section, the term "shopping cart" means those pushcarts of the type which are commonly provided by grocery stores, drugstores, or other merchant stores or markets for the use of the public in transporting commodities in stores and markets and incidentally from the store to a place outside the store.

(b) It shall be unlawful for any person to remove a shopping cart from the premises of the owner of such shopping cart without the consent, given at the time of such removal, of the owner or of his or her agent, servant, or employee. For the purpose of this Code section, the premises shall include all the parking area set aside by the owner or on behalf of the owner for the parking of cars for the convenience of the patrons of the owner.

(c) It shall be unlawful for any person to abandon a shopping cart upon any public street, sidewalk, way, or parking lot other than a parking lot on the premises of the owner.

(d) Any person who violates this Code section shall be guilty of a misdemeanor. (Ga. L. 1975, p. 848, § 1; Ga. L. 2012, p. 162, § 1/HB 1093.)

The 2012 amendment, effective April 16, 2012, inserted "the term" near the beginning of subsection (a); in the first sentence of subsection (b), deleted ", posted as provided in subsection (d) of this Code section," following "the premises" and inserted "or her"; deleted former subsection (d), which read: "The owner of the store in which the shopping cart is used shall post in at least three prominent places in his store and at each exit therefrom a printed copy of this Code section, which copy shall be printed in type no smaller than 12 points."; redesignated former subsection (e) as present subsection (d); and deleted "subsection (b) or (c) of" following "violates" near the beginning of present subsection (d).

ARTICLE 2

ROBBERY

16-8-40. Robbery.

JUDICIAL DECISIONS

Analysis

General Consideration

Aggravated assault conviction merged with robbery conviction where, etc.

Defendants' robbery and aggravated assault convictions, under O.C.G.A. §§ 16-5-21 and 16-8-40, merged because, while aggravated assault did not require taking property from another, aggravated assault was proved by the same or less than all facts required to show robbery, as the assault forming the basis of the aggravated assault with intent to rob, which was pointing a pistol at the victim, was "contained within" the element of robbery requiring the defendants to have used force, intimidation, threat or coercion, or placed the victim in fear of immediate serious bodily injury. Washington v. State,

310 Ga. App. 775, 714 S.E.2d 364 (2011).

Evidence sufficient for conviction.

Evidence was sufficient to support the defendant's conviction for conspiracy to commit armed robbery because evidence was presented that the defendant and a codefendant entered a restaurant to rob the restaurant and shot two employees of the restaurant. In a statement to the police, the defendant admitted that the defendant entered the restaurant with a handgun to rob the restaurant, but the defendant claimed that the defendant heard gunshots and left the restaurant, while the codefendant gave a similar statement to the police. Watkins v. State, 289 Ga. 359, 711 S.E.2d 655 (2011).

Robbery by Force

Evidence sufficient to support conviction.

Pursuant to O.C.G.A. § 16-2-20, because the defendant was not only present when a robbery was committed, but also actively aided and abetted the robbery's commission and received a portion of the money taken from the victim, the evidence was sufficient to find the defendant guilty of robbery by force beyond a reasonable doubt under O.C.G.A. § 16-8-40(a)(1). Brown v. State, 314 Ga. App. 375, 724 S.E.2d 410 (2012).

Included Offenses

Consolidation of indictments proper. — Trial court properly consolidated the indictments charging the defendant with armed robbery, criminal attempt to commit armed robbery, aggravated assault, possession of a firearm during the commission of a crime, and theft by receiving stolen property because joinder was not prejudicial or erroneous since evidence of the various, intertwined crimes would have been admissible against the defendant had the indictments been tried separately; the trial court was authorized to find that the events in the indictments committed within a two-day period and involving guns and a car constituted a series of connected acts, and the connection between the robberies and the assaults helped identify defendant. Jackson v. State, 309 Ga. App. 796, 714 S.E.2d 584 (2011).

No merger of robbery by intimidation and kidnapping.

Because a defendant forced the victim to drive to an abandoned house and then drove the victim through other neighborhoods before forcing the victim out of the car and refusing to return the victim's personal belongings, the defendant's convictions for kidnapping and robbery by intimidation under O.C.G.A. §§ 16-5-40(a) and 16-8-40 did not merge; pursuant to O.C.G.A. § 17-2-2(e), venue was proper in any county through which the vehicle traveled. Aldridge v. State, 310 Ga. App. 502, 713 S.E.2d 682 (2011).

Robbery by Snatching

Robbery by snatching where victim aware of theft.

Evidence was sufficient to show that a wallet was taken from the victim's "immediate presence" and that the victim was conscious of the robbery as the robbery occurred since the victim saw the defendant take the wallet from a cart only six feet away; the victim of a robbery by sudden snatching need not become aware of the taking prior to the taking, and it is sufficient if the evidence shows that the victim became aware of the taking as the crime was being committed. Brown v. State, 309 Ga. App. 511, 710 S.E.2d 674 (2011).

Jury Instructions

Charge on theft by taking not authorized.

Evidence did not support a charge on theft by taking, O.C.G.A. § 16-8-2, as a lesser included offense of robbery by sudden snatching, O.C.G.A. § 16-8-40(a)(3), because the evidence showed that the victim was conscious of the crime as the crime was being committed; even if the victim did not actually see the defendant pick up the wallet, when the victim saw the defendant running toward the exit of a store with the wallet the victim gave chase but was unable to stop the defendant. Brown v. State, 309 Ga. App. 511, 710 S.E.2d 674 (2011).

16-8-41. Armed robbery; robbery by intimidation; taking controlled substance from pharmacy in course of committing offense.

JUDICIAL DECISIONS

Analysis

General Consideration

Proof of venue.

Evidence that an armed robbery occurred very near, within sight distance, of the intersection of two roads, and an officer's testimony that the officer was familiar with the area and that the intersection of the two roads was in DeKalb County was sufficient to prove venue beyond a reasonable doubt in DeKalb County. Alexis v. State, 313 Ga. App. 283, 721 S.E.2d 205 (2011).

Immediate presence sufficient.

Evidence sufficiently established that the defendant took property from the person and immediate presence of the victim because the evidence established that the victim was being held at gunpoint in the kitchen while the defendant stole items from various rooms in the house. Patterson v. State, 312 Ga. App. 793, 720 S.E.2d 278 (2011), cert. denied, No. S12C0574, 2012 Ga. LEXIS 327 (Ga. 2012).

Because the armed robbery count of the indictment sufficiently alleged the elements of armed robbery, trial counsel was not ineffective for failing to challenge it, and the trial court did not err in denying the defendant's motion for new trial as to the ineffective assistance claim; that the property was taken from the person or immediate presence of another is necessarily inferred from the allegation of a use of an offensive weapon to accomplish the taking, and the alleged offense of "armed robbery" can be accomplished only via a taking from the person or immediate presence of another. Patterson v. State, 312 Ga. App. 793, 720 S.E.2d 278 (2011), cert. denied, No. S12C0574, 2012 Ga. LEXIS 327 (Ga. 2012).

Defendant arrested and indicted within statute of limitation. — Trial court did not abuse the court's discretion in denying the defendant's motion to dismiss an indictment charging the defendant with armed robbery, O.C.G.A. § 16-8-41, for a violation of the defendant's right to due process because the defendant failed to show that the defense was prejudiced by the six year delay between the commission of the crime and the defendant's arrest or that the state deliberately delayed the arrest to obtain a tactical advantage; the defendant was arrested and indicted for armed robbery, a noncapital felony, within the applicable seven-year statute of limitation, O.C.G.A. §§ 16-8-41(a) and 17-3-1(c), and the mere existence of the possibility that the latent prints could have established "the real perpetrator" if the prints had matched the prints of another offender in the government's database did not establish actual prejudice. Billingslea v. State, 311 Ga. App. 490, 716 S.E.2d 555 (2011).

Jury Charge

Pattern jury instruction including witness's degree of certainty in identification. — Defendant's trial counsel was not ineffective for requesting the pattern jury instruction that included a witness's degree of certainty as a factor the jury could consider in assessing the reliability of a witness's identification testimony because the defendant failed to show that the defendant was prejudiced by the request, given the other evidence linking the defendant to the crimes, including the defendant's possession of a victim's cell phone and a revolver match-

ing the description of the one used in all three robberies. Willis v. State, 309 Ga. App. 414, 710 S.E.2d 616 (2011), cert. denied, No. S11C1356, 2012 Ga. LEXIS 70 (Ga. 2012).

Counsel not ineffective for failing to object to jury charge on armed robbery. — Trial counsel was not ineffective for failing to object to a discrepancy between the armed robberies as alleged in the indictment and the manner in which the jury was charged on the armed robbery offenses because the evidence uniformly showed that the article used in the robbery was a handgun; there was not a reasonable likelihood that the jury convicted the defendant of robbing the victims with a replica, which was mentioned in the trial court's charge to the jury, because each victim referred to the weapon only as a handgun and explicitly referred to the victims' fear of being shot. Green v. State, 310 Ga. App. 874, 714 S.E.2d 646 (2011), cert. denied, 2012 Ga. LEXIS 232 (Ga. 2012).

Sentence

Sentence as recidivist proper.

Trial court did not err in imposing a sentence of life imprisonment without parole after the defendant was convicted of armed robbery because the record did not support the defendant's assertion that the conviction was obtained in violation of the defendant's constitutional right to counsel; the state offered evidence that the defendant's prior case was tried before a jury, that the defendant exercised the constitutional right to self representation, and that appointed standby counsel was available to assist the defendant at trial. Willis v. State, 309 Ga. App. 414, 710 S.E.2d 616 (2011), cert. denied, No. S11C1356, 2012 Ga. LEXIS 70 (Ga. 2012).

Sentence appropriate.

Defendant's life sentence for armed robbery was within the statutory limits, O.C.G.A. § 16-8-41(b), and the 20-year sentences imposed for the defendant's aggravated assaults were within the statutory range of punishment under O.C.G.A. § 16-5-21(b). Therefore, the sentences were not void, and the court had no basis for disturbing the sentences. Gillespie v. State, 311 Ga. App. 442, 715 S.E.2d 832 (2011).

Sentence of ten years to serve for felony shoplifting was upheld; contrary to the defendant's contention, the trial court did not sentence the defendant as a recidivist pursuant to O.C.G.A. § 17-10-7. The trial court's imposition of a sentence within the statutory limits would not be disturbed. Tyner v. State, 313 Ga. App. 557, 722 S.E.2d 177 (2012).

Included Offenses

No merger with aggravated assault.

Defendant's convictions for armed robbery and aggravated assault did not merge because each crime required proof of conduct that the other did not; the armed robbery as charged in the indictment required proof of an intent to rob and that the victim's wallet was taken, while the aggravated assaults required proof that the victim's neck was slashed with a sharp weapon. Thomas v. State, 310 Ga. App. 404, 714 S.E.2d 37 (2011).

Trial court was correct not to merge the defendant's convictions for armed robbery and aggravated assault because although the defendant's conviction for the armed robbery of the victim resulted from a holdup, the conviction for aggravated assault was based on the defendant's forcing the shotgun down the victim's throat later in a bathroom. Thomas v. State, 289 Ga. 877, 717 S.E.2d 187 (2011).

Trial court did not err in failing to merge the aggravated assault count of the indictment with the armed robbery count because the defendant knowingly and voluntarily pled guilty to each of the crimes for which the defendant was indicted, and as a consequence, the defendant waived all defenses except that the indictment charged no crime, including the issue of whether the offenses merged as a matter of law or fact; the defendant chose to admit that the defendant committed the acts so the defendant could avoid a trial on the question of guilt or innocence, and having accepted the benefits of such a bargain, it would be contrary to public policy and the ends of justice to allow the defendant to avoid the consequences of the agreement. Carson v. State, 314 Ga. App. 225, 723 S.E.2d 516 (2012).

Trial court did not err when the court refused to merge the defendant's aggravated assault and armed robbery convictions because the armed robbery and aggravated assault were separate and distinct acts; the victim's testimony showed that the armed robbery was complete before the commission of the aggravated assault. Brown v. State, 314 Ga. App. 198, 723 S.E.2d 520 (2012).

Merger with aggravated assault.

Trial court's failure to merge the defendant's aggravated assault conviction with the defendant's armed robbery conviction in imposing the sentence was erroneous because there was no element of aggravated assault with a deadly weapon that was not contained in armed robbery; both crimes required proof of an intent to rob because the elements of the defendant's armed robbery charge under O.C.G.A. § 16-8-41(a) included an intent to rob, the use of an offensive weapon, and the taking of property from the person or presence of another, and the elements of the defendant's aggravated assault charge under O.C.G.A. § 16-5-21(a) included an assault upon the victim, an intent to rob, and the use of a deadly weapon. Daniels v. State, 310 Ga. App. 562, 714 S.E.2d 91 (2011).

Because the defendant's convictions for armed robbery and aggravated assault arose from the same act or transaction, the defendant's taking money from the victim at gunpoint, the defendant's aggravated assault conviction against that victim merged with the armed robbery conviction. Thomas v. State, 289 Ga. 877, 717 S.E.2d 187 (2011).

Trial court erred by failing to merge an aggravated assault charge into an armed robbery charge because the victim testified repeatedly that the defendant was in the victim's apartment when the defendant shot the victim and that the victim fired a gun as soon as the victim saw the defendant point a gun at the victim while forcing the defendant's way in; both crimes were complete when the defendant pointed the gun at the victim while simultaneously entering the apartment, and there was no separate aggravated assault before the armed robbery began. Davis v. State, 312 Ga. App. 328, 718 S.E.2d 559 (2011).

Trial court erred in failing to merge the defendant's conviction for aggravated assault with a deadly weapon, O.C.G.A. § 16-5-21(a)(2), into the defendant's conviction for armed robbery conviction, O.C.G.A. § 16-8-41(a), because the act of using an offensive weapon for the purposes of committing an armed robbery was the legal equivalent of assault for the purposes of committing an aggravated assault; it is not determinative under the merger analysis that the desired object of a defendant's armed robbery was something other than that which he or she actually took, but instead, what dictates merger is the fact that both crimes for which the defendant was convicted were predicated upon the same conduct. Hall v. State, 313 Ga. App. 66, 720 S.E.2d 181 (2011).

Merger with aggravated assult with intent to rob.

Trial court erred in not merging a defendant's aggravated assault with attempt to rob conviction, O.C.G.A. § 16-8-21(a), into the defendant's armed robbery conviction, O.C.G.A. § 16-8-41. The offense of armed robbery contained a requirement, the taking of property, that aggravated assault did not, but aggravated assault with intent to rob did not require proof of a fact which armed robbery did not. Daniels v. State, 310 Ga. App. 541, 713 S.E.2d 689 (2011).

No merger with murder count.

Defendant's conviction for armed robbery was properly not merged into a malice murder conviction pursuant to O.C.G.A. § 16-1-7(a)(1), based on the "required evidence" test, as each offense required proof of an element that the other did not. Culpepper v. State, 289 Ga. 736, 715 S.E.2d 155 (2011).

Application

Identification of defendant.

Trial court did not err in denying the defendant's motion to exclude the in-court identification by each of the armed robbery victims because each of the victims' identification of the defendant had an independent origin; each of the victims observed the defendant face to face in full daylight and identified the defendant's photograph within days of being robbed,

and the first victim identified the defendant as the victim drove by in a car. Willis v. State, 309 Ga. App. 414, 710 S.E.2d 616 (2011), cert. denied, No. S11C1356, 2012 Ga. LEXIS 70 (Ga. 2012).

Evidence was sufficient to convict a defendant of armed robbery in violation of O.C.G.A. § 16-8-41(a) of the victim, a restaurant employee, who was pressure washing the exterior of the restaurant in a lit parking lot. The employee testified that the employee observed the defendant's face the entire time that the defendant held a gun to the employee's chest. Battise v. State, 309 Ga. App. 835, 711 S.E.2d 390 (2011).

Value of property taken is irrelevant to offense of armed robbery.

Evidence was sufficient to convict the defendant of armed robbery because the defendant's testimony affirmed that the front-seat passenger pulled a gun on the victim, but never addressed whether or not money was taken; O.C.G.A. § 16-8-41(a) presents no requirement of proof of value. Cook v. State, 314 Ga. App. 289, 723 S.E.2d 709 (2012).

No variance as to weapon.

There was no fatal variance between the indictment that alleged that the defendant committed armed robbery by use of a pellet pistol and evidence that showed that the weapon used was a BB gun. Jones v. State, 312 Ga. App. 15, 717 S.E.2d 526 (2011).

Severance not required.

Trial court did not abuse the court's discretion in denying the defendant's motion to sever armed robbery offenses because the three robberies took place in a limited geographical area within four weeks of each other, each involved a man approaching a lone pedestrian during the daytime, pointing a revolver at the victim, and demanding that the victim throw the victim's money and property on the ground, and then fleeing on foot; the modus operandi of the robberies was strikingly similar, allowing the trial court the discretion to deny the motion to sever, and the evidence was far from complex and posed no significant risk of jury confusion. Willis v. State, 309 Ga. App. 414, 710 S.E.2d 616 (2011), cert. denied, No. S11C1356, 2012 Ga. LEXIS 70 (Ga. 2012).

Circumstantial evidence sufficient.

Circumstantial evidence that a defendant was found walking not far from the scene of a robbery, with money in similar denominations to that which was stolen, clothing (including ski gloves) as described by the victim, and a gun, was sufficient to support the defendant's conviction for armed robbery in violation of O.C.G.A. § 16-8-41(a). Rankin v. State, 309 Ga. App. 817, 711 S.E.2d 377 (2011).

Evidence of the circumstances was sufficient to establish the defendant's identity as the perpetrator and the defendant's guilt of armed robbery, O.C.G.A. § 16-8-41, aggravated assault, O.C.G.A. § 16-5-21, and possession of a firearm during the commission of a crime, O.C.G.A. § 16-11-106 because the defendant matched the description of the perpetrator given by both a convenience store clerk and another store employee; when the defendant was apprehended, an officer recovered next to the defendant's person the contraband and instrumentalities used in the commission of the robbery. Daniels v. State, 310 Ga. App. 562, 714 S.E.2d 91 (2011).

Merger with other convictions.

Defendant's conviction for aggravated assault merged into the defendant's conviction for attempted armed robbery because the relevant aggravated assault provision did not require proof of any fact that was not also required to prove the attempted armed robbery as that offense could have been proved under the indictment in the case. Garland v. State, 311 Ga. App. 7, 714 S.E.2d 707 (2011).

Testimony regarding observation of video surveillance recording not hearsay. — Trial court did not abuse the court's discretion in allowing a store manager to testify regarding the manager's observation of the store's video-surveillance-system recording, which showed the defendant just before the defendant entered the store, because the testimony was not hearsay since it did not ask the jury to assume the truth of out-of-court statements made by others, and instead the value of the testimony rested on the store manager's own veracity and competence; the store manager did not testify about what another person said or wrote

outside of court, but rather, the store manager testified as to the manager's personal observations of the defendant's conduct that appeared on the video-surveillance-system recording. McClain v. State, 311 Ga. App. 750, 716 S.E.2d 829 (2011).

Evidence sufficient to sustain conviction for armed robbery.

Evidence was sufficient for the jury to find the defendant guilty beyond a reasonable doubt of using a handgun to rob each of the victims because on three separate occasions within a three week period, the defendant used a revolver to rob a solitary pedestrian during daylight hours, all in the same part of the city, and at trial, each of the victims identified the defendant as the person who robbed them; after arresting the defendant, officers inventoried the contents of the defendant's vehicle and found a loaded .38 caliber revolver and a cell phone, and an officer determined that the cell phone belonged to the third victim. Willis v. State, 309 Ga. App. 414, 710 S.E.2d 616 (2011), cert. denied, No. S11C1356, 2012 Ga. LEXIS 70 (Ga. 2012).

Evidence was sufficient to convict a defendant of armed robbery based on the victim's testimony that the defendant and the defendant's codefendant approached the victim, asked for cigarettes, pulled a gun on the victim and stuck a gun in the victim's stomach, then relieved the victim of the victim's cigarettes and the victim's wallet with $300 that the victim had just been paid. Scruggs v. State, 309 Ga. App. 569, 711 S.E.2d 86 (2011).

Evidence was sufficient to support the defendant's conviction for armed robbery after a convenience store clerk was robbed at gunpoint by a perpetrator who was wearing a nylon stocking over the perpetrator's head because: (1) the clerk recognized the defendant as the perpetrator by the defendant's voice and physical build when the defendant returned to the store three days later as a customer; (2) the clerk later identified defendant as the perpetrator in a picture lineup; and (3) the state presented the testimony of an expert polygraph examiner, who stated that defendant showed deception to questions concerning the armed robbery. Jones v. State, 309 Ga. App. 886, 714 S.E.2d 590 (2011).

Because the defendant admitted entry into a home, the defendant's statement to a witness, and the victim's in-court identification of the defendant supported the defendant's conviction of armed robbery and burglary under O.C.G.A. §§ 16-7-1(a) and 16-8-41(a), the jury could find that a conspiracy existed without regard to a coconspirator's statements under O.C.G.A. § 24-3-5. Lewis v. State, 311 Ga. App. 54, 714 S.E.2d 732 (2011).

Evidence was sufficient to enable a rational trier of fact to find the defendant guilty beyond a reasonable doubt of malice murder, felony murder while in the commission of armed robbery, armed robbery, and conspiracy to violate the Georgia Controlled Substances Act, O.C.G.A. § 16-13-20 et seq., through a violation of O.C.G.A. § 16-13-30(j)(1), because: (1) the defendant and another buyer met with the victim and another seller where the defendant and the other buyer inspected marijuana which the victim and the other seller had for sale; (2) after some discussion about price, the victim told the defendant what the price was and that the defendant could take it or leave it; (3) the defendant said that the defendant would take it, pulled a gun from the defendant's waistband, and fatally shot the victim; and (4) there was conflicting testimony as to whether the defendant took the marijuana and ran away with the marijuana after shooting the victim. Darville v. State, 289 Ga. 698, 715 S.E.2d 110 (2011).

Defendant's convictions for armed robbery, aggravated assault, and malice murder were based on sufficient evidence when a victim in an apartment next to the defendant's was fatally stabbed multiple times, there was physical evidence that tied the defendant to the criminal incident, and the defendant confessed to committing the crimes. Culpepper v. State, 289 Ga. 736, 715 S.E.2d 155 (2011).

Trial court had sufficient evidence to convict a defendant of armed robbery and possession of a firearm during the commission of a crime as a party to those crimes by aiding and abetting, pursuant to O.C.G.A. § 16-2-20, given evidence that the defendant helped plan the robberies of two game rooms, drove the getaway vehicle, and participated in the division of the

proceeds. Norman v. State, 311 Ga. App. 721, 716 S.E.2d 805 (2011).

Evidence was sufficient to support the defendant's conviction for armed robbery, under O.C.G.A. § 16-8-41(a), because: (1) the perpetrator of a crime entered just before closing time a fast-food restaurant with a gun and directed the employees into a room, a cooler, and a freezer; (2) the perpetrator took money from the restaurant, shot one of the employees, and left the scene in the employee's car; (3) one of the employees telephoned relatives with a cell phone and told them what was happening; (4) the relatives called the police, came to the restaurant, and saw the perpetrator drive away; (5) money, a gun, and discarded clothing was recovered from the car or the area where the perpetrator fled on foot; (6) a police officer, who was pursuing the perpetrator, was wounded in an altercation with the perpetrator when the officer's gun discharged; (7) when the defendant later surrendered to the police, DNA from the officer's blood was found on the defendant's chest; and (8) the employees, the relatives, and the officer identified the defendant, a former employee of the restaurant who was fired days before the crime, as the perpetrator. Donald v. State, 312 Ga. App. 222, 718 S.E.2d 81 (2011).

Evidence was sufficient to authorize the defendant's convictions for hijacking a motor vehicle, in violation of O.C.G.A. § 16-5-44.1(b), armed robbery, in violation of O.C.G.A. § 16-8-41, aggravated assault, in violation of O.C.G.A. § 16-5-21(a)(2), and possession of a knife during the commission of a crime, in violation of O.C.G.A. § 16-11-106(b), based on the defendant's involvement as a party to the crimes, or as a coconspirator under O.C.G.A. § 16-2-20(b). The evidence presented was that: (1) when two people walked past the victim's parked vehicle, one of the people held a knife to the victim's stomach and ordered the victim to give the person the victim's wallet and keys; (2) the victim complied; (3) the person with the knife got into the driver's seat and the defendant, who had stood nearby during the incident, got into the passenger seat; (3) the victim identified the defendant as the person who got into the passenger seat; (4) the people drove away, but were apprehended; (5) the victim's wallet was recovered, on the ground to the rear of the vehicle, on the passenger side; and (6) the defendant wanted to leave the area because there was a warrant for the defendant's arrest. Harrelson v. State, 312 Ga. App. 710, 719 S.E.2d 569 (2011).

Evidence that a defendant concealed a designer handbag and four wallets under a shopping bag and started to leave a department store, and that the defendant then, seeing a security guard had been alerted, concealed the items under a clothing rack, was sufficient to convict the defendant of felony shoplifting in violation of O.C.G.A. § 16-8-14(a)(1). Tyner v. State, 313 Ga. App. 557, 722 S.E.2d 177 (2012).

Evidence was sufficient to sustain the defendant's convictions for armed robbery, O.C.G.A. § 16-8-41(a), aggravated assault, O.C.G.A. § 16-5-21, and possession of a firearm during the commission of a felony, O.C.G.A. § 16-11-106(b), because the victim testified about the assault and identified the defendant as the person who committed the assault; the competent testimony of even a single witness can be enough to sustain a conviction. Brown v. State, 314 Ga. App. 198, 723 S.E.2d 520 (2012).

Evidence was sufficient to support the defendant's conviction for armed robbery because the phone and cash register taken from the immediate presence of the victim was the property of another in that the property belonged to the phone business of the victim's family. Jackson v. State, No. A11A2019, 2012 Ga. App. LEXIS 151 (Feb. 17, 2012).

Sufficient evidence showed the defendant committed armed robbery, under O.C.G.A. § 16-8-41(a), because the defendant accompanied a codefendant to a crime scene, acted as a lookout, and shared in the proceeds. Campbell v. State, 314 Ga. App. 299, 724 S.E.2d 24 (2012).

Evidence was sufficient to support the defendant's conviction for armed robbery because an accomplice testified to committing a series of armed robberies and that the defendant had participated by selecting the stores to rob, supplying the gun, acting as the getaway driver, and receiv-

ing part of the stolen money; law enforcement officers testified that the accomplice implicated the defendant during an interrogation, and officers found items of clothing matching those worn by the armed robber in the defendant's hotel room. Williams v. State, No. A11A1662, 2012 Ga. App. LEXIS 183 (Feb. 23, 2012).

Parties to crime.

Rational trier of fact could have found beyond a reasonable doubt that the evidence was sufficient to establish that the defendant was guilty of aggravated assault, possession of a firearm during the commission of a felony, hijacking a motor vehicle, and armed robbery because there was ample evidence, based upon the defendant's actions and presence, companionship, conduct, and demeanor before, during, and after the commission of the crime, to conclude that the defendant was more than "merely present" during the commission of the crimes and was a party to the crimes pursuant to O.C.G.A. § 16-2-20; while in a car with the victim and companions, the front-seat passenger pulled out a gun and shot the victim, and during the incident, the defendant did not say or do anything to intervene. Cook v. State, 314 Ga. App. 289, 723 S.E.2d 709 (2012).

Evidence authorized the jury to exclude every reasonable hypothesis other than that the defendant was a party to the crime of armed robbery, O.C.G.A. § 16-8-41(a), because at trial, the victim identified the defendant as matching the description of one of the men who attacked the victim, and the defendant admitted to being with the codefendant on the night of the offense. Kirkland v. State, No. A11A1891; No. A11A1968, 2012 Ga. App. LEXIS 339 (Mar. 26, 2012).

Corroborating accomplice testimony sufficient to support conviction.

Trial court did not err in denying the defendant's motion for a directed verdict of acquittal because the state presented sufficient evidence to corroborate a coconspirator's testimony under O.C.G.A. § 24-4-8 and for the jury to find beyond a reasonable doubt that the defendant committed armed robbery, O.C.G.A. § 16-8-41(a), hijacking a motor vehicle, O.C.G.A. § 16-5-44.1(b), and kidnapping, O.C.G.A. § 16-5-40(a); the state presented the testimony of numerous witnesses and other evidence that sufficiently corroborated the co-conspirator's testimony about the defendant's participation in the crimes. Walker v. State, 310 Ga. App. 223, 713 S.E.2d 413 (2011).

Trial court did not err in denying the defendant's motion for directed verdict after the defendant was convicted of armed robbery because there was no violation of O.C.G.A. § 24-4-8 since there was evidence from which a jury could find sufficient corroboration of the accomplice's testimony to support the defendant's conviction; the testimony of the victims corroborated the accomplice's testimony because the victims physical description of the perpetrator was consistent with the accomplice's testimony about what the defendant was wearing on the day of the robbery. Harris v. State, 311 Ga. App. 336, 715 S.E.2d 757 (2011).

Defendant's convictions of malice murder, armed robbery, and other crimes were not based on the uncorroborated testimony of an accomplice in violation of O.C.G.A. § 24-4-8 as: 1) a victim testified that intruders took a wallet that police later found in the defendant's home; and 2) cell phone tower records established that the defendant and the accomplice were exchanging phone calls during the times when the crimes were committed and within the vicinity of the crime sites. Jackson v. State, 289 Ga. 798, 716 S.E.2d 188 (2011).

Circumstantial evidence sufficient for bank robbery. — Any rational trier of fact could find the defendant guilty beyond a reasonable doubt of terroristic threats, O.C.G.A. § 16-11-37(a), hoax devices, O.C.G.A. § 16-7-85(a), and armed robbery, O.C.G.A. § 16-8-41(a) because although circumstantial, the evidence authorized the jury to exclude every reasonable hypothesis other than that the defendant engaged in the acts that constituted the crimes; even though the defendant was apprehended while wearing clothing that did not match that described by the victims, an officer familiar with the habits of bank robbers testified that bank robbers like to wear multi-layer clothing

and then shed clothes after the crime. Williams v. State, 312 Ga. App. 22, 717 S.E.2d 532 (2011).

Motion to withdraw guilty plea.

Trial court did not err in denying the defendant's motion to withdraw the guilty plea to armed robbery, O.C.G.A. § 16-8-41(a), aggravated assault with a deadly weapon, O.C.G.A. § 16-5-21(a)(2), cruelty to children in the first degree, O.C.G.A. § 16-5-70(b), and possession of a firearm during the commission of a felony, O.C.G.A. § 16-11-106(b)(1), because the state met the state's burden of showing that the defendant understood the constitutional rights the defendant was giving up by pleading guilty, that the defendant understood that since the plea was non-negotiated, the trial court would sentence the defendant to at least ten years imprisonment and could sentence the defendant to a maximum sentence of life in prison, and that the defendant knowingly and voluntarily entered the guilty plea in order to avoid a trial on the indicted charges. Carson v. State, 314 Ga. App. 225, 723 S.E.2d 516 (2012).

ARTICLE 3

CRIMINAL REPRODUCTION AND SALE OF RECORDED MATERIAL

16-8-60. Reproduction of recorded material; transfer, sale, distribution, circulation; forfeiture; restitution.

JUDICIAL DECISIONS

Multiple charges. — Because defendant's argument on appeal was a challenge to defendant's convictions for making 91 unauthorized offers to sell recorded material under O.C.G.A. § 16-8-60(b), and because an O.C.G.A. § 16-1-7(a) motion to correct or modify an illegal sentence was not an appropriate remedy to attack a conviction in a criminal case, defendant did not properly challenge the convictions; defendant's only recourse was through habeas corpus proceedings. Rogers v. State, 314 Ga. App. 398, 724 S.E.2d 417 (2012).

ARTICLE 5

RESIDENTIAL MORTGAGE FRAUD

16-8-101. Definitions.

As used in this article, the term:

(1) "Mortgage lending process" means the process through which a person seeks or obtains a residential mortgage loan including, but not limited to, solicitation, application, or origination, negotiation of terms, third-party provider services, underwriting, signing and closing, and funding of the loan. Such term shall also include the execution of deeds under power of sale that are required to be recorded pursuant to Code Section 44-14-160 and the execution of assignments that are required to be recorded pursuant to subsection (b) of Code Section 44-14-162. Documents involved in the mortgage lending process include, but shall not be limited to, uniform residen-

tial loan applications or other loan applications; appraisal reports; HUD-1 settlement statements; supporting personal documentation for loan applications such as W-2 forms, verifications of income and employment, bank statements, tax returns, and payroll stubs; and any required disclosures.

(2) "Pattern of residential mortgage fraud" means one or more misstatements, misrepresentations, or omissions made during the mortgage lending process that involve two or more residential properties, which have the same or similar intents, results, accomplices, victims, or methods of commission or otherwise are interrelated by distinguishing characteristics.

(3) "Person" means a natural person, corporation, company, limited liability company, partnership, trustee, association, or any other entity.

(4) "Residential mortgage loan" means a loan or agreement to extend credit made to a person, which loan is secured by a deed to secure debt, security deed, mortgage, security interest, deed of trust, or other document representing a security interest or lien upon any interest in one-to-four family residential property located in Georgia including the renewal or refinancing of any such loan. (Code 1981, § 16-8-101, enacted by Ga. L. 2005, p. 848, § 2/SB 100; Ga. L. 2006, p. 72, § 16/SB 465; Ga. L. 2012, p. 668, § 1/HB 237.)

The 2012 amendment, effective July 1, 2012, in paragraph (1), added the second sentence and substituted "but shall not be limited" for "but are not limited" in the last sentence.

16-8-102. Residential mortgage fraud.

A person commits the offense of residential mortgage fraud when, with the intent to defraud, such person:

(1) Knowingly makes any deliberate misstatement, misrepresentation, or omission during the mortgage lending process with the intention that it be relied on by a mortgage lender, borrower, or any other party to the mortgage lending process;

(2) Knowingly uses or facilitates the use of any deliberate misstatement, misrepresentation, or omission, knowing the same to contain a misstatement, misrepresentation, or omission, during the mortgage lending process with the intention that it be relied on by a mortgage lender, borrower, or any other party to the mortgage lending process;

(3) Receives any proceeds or any other funds in connection with a residential mortgage closing that such person knew resulted from a violation of paragraph (1) or (2) of this Code section;

(4) Conspires to violate any of the provisions of paragraph (1), (2), or (3) of this Code section; or

(5) Files or causes to be filed with the official registrar of deeds of any county of this state any document such person knows to contain a deliberate misstatement, misrepresentation, or omission.

An offense of residential mortgage fraud shall not be predicated solely upon information lawfully disclosed under federal disclosure laws, regulations, and interpretations related to the mortgage lending process nor upon truthful information contained in documents filed with the official registrar of deeds of any county of this state for the stated purpose of correcting scrivener's errors, mistakes, inadvertent misstatements, or omissions contained in previously filed documents. (Code 1981, § 16-8-102, enacted by Ga. L. 2005, p. 848, § 2/SB 100; Ga. L. 2012, p. 668, § 2/HB 237.)

The 2012 amendment, effective July 1, 2012, added the language beginning "nor upon truthful information" and ending "previously filed documents" at the end of the ending undesignated paragraph.

CHAPTER 9

FORGERY AND FRAUDULENT PRACTICES

Article 1

Forgery and Related Offenses

Article 2

Deposit Account Fraud

ARTICLE 1

FORGERY AND RELATED OFFENSES

16-9-1. Forgery; classification of forgery offenses.

(a) As used in this Code section, the term:

(1) "Bank" means incorporated banks, savings banks, banking companies, trust companies, credit unions, and other corporations doing a banking business.

(2) "Check" means any instrument for the payment or transmission of money payable on demand and drawn on a bank.

(3) "Writing" includes, but shall not be limited to, printing or any other method of recording information, money, coins, tokens, stamps,

seals, credit cards, badges, trademarks, and other symbols of value, right, privilege, or identification.

(b) A person commits the offense of forgery in the first degree when with the intent to defraud he or she knowingly makes, alters, or possesses any writing, other than a check, in a fictitious name or in such manner that the writing as made or altered purports to have been made by another person, at another time, with different provisions, or by authority of one who did not give such authority and utters or delivers such writing.

(c) A person commits the offense of forgery in the second degree when with the intent to defraud he or she knowingly makes, alters, or possesses any writing, other than a check, in a fictitious name or in such manner that the writing as made or altered purports to have been made by another person, at another time, with different provisions, or by authority of one who did not give such authority.

(d) A person commits the offense of forgery in the third degree when with the intent to defraud he or she knowingly:

(1) Makes, alters, possesses, utters, or delivers any check written in the amount of $1,500.00 or more in a fictitious name or in such manner that the check as made or altered purports to have been made by another person, at another time, with different provisions, or by authority of one who did not give such authority; or

(2) Possesses ten or more checks written without a specified amount in a fictitious name or in such manner that the checks as made or altered purport to have been made by another person, at another time, with different provisions, or by authority of one who did not give such authority.

(e) A person commits the offense of forgery in the fourth degree when with the intent to defraud he or she knowingly:

(1) Makes, alters, possesses, utters, or delivers any check written in the amount of less than $1,500.00 in a fictitious name or in such manner that the check as made or altered purports to have been made by another person, at another time, with different provisions, or by authority of one who did not give such authority; or

(2) Possesses less than ten checks written without a specified amount in a fictitious name or in such manner that the checks as made or altered purport to have been made by another person, at another time, with different provisions, or by authority of one who did not give such authority. (Code 1933, § 26-1701, enacted by Ga. L. 1968, p. 1249, § 1; Ga. L. 1969, p. 857, § 6; Ga. L. 2012, p. 899, § 3-5/HB 1176.)

The 2012 amendment, effective July 1, 2012, added subsection (a); redesignated former subsection (a) as present subsection (b); in subsection (b), inserted "the" preceding "intent to" near the beginning, inserted "or she", and inserted ", other than a check," near the middle; deleted former subsection (b), which read: "A person convicted of the offense of forgery in the first degree shall be punished by imprisonment for not less than one nor more than ten years."; and added subsections (c) through (e). See editor's note for applicability.

Editor's notes. — Ga. L. 2012, p. 899, § 9-1(a)/HB 1176, not codified by the General Assembly, provides: "This Act shall become effective on July 1, 2012, and shall apply to offenses which occur on or after that date. Any offense occurring before July 1, 2012, shall be governed by the statute in effect at the time of such offense and shall be considered a prior conviction for the purpose of imposing a sentence that provides for a different penalty for a subsequent conviction for the same type of offense, of whatever degree or level, pursuant to this Act."

JUDICIAL DECISIONS

Analysis

Evidence

Evidence

Evidence sufficient for conviction. The following evidence was sufficient to convict the defendant of felony forgery: 1) the defendant's accomplice testified to cashing forged checks supplied by defendant and giving the defendant the money; 2) surveillance tapes showed the two talking together before, and the defendant chasing the accomplice after, the checks were cashed; 3) a witness testified that, just prior to the charged offense, the witness saw the defendant use an accomplice to cash forged checks. Chandler v. State, 311 Ga. App. 86, 714 S.E.2d 597 (2011), cert. denied, No. S11C1861, 2011 Ga. LEXIS 985 (Ga. 2011).

Evidence was insufficient to support defendant's conviction, etc. State failed to prove that the defendant lacked the authority to possess and deliver money orders as required to support forgery convictions under O.C.G.A. § 16-9-1(a) because the trial court erred in admitting the "counterfeit" stamps on the money orders as business records under O.C.G.A. § 24-3-14(b), and the state failed to present any other evidence to establish that the money orders were counterfeit; the testimony of the branch manager at a bank indicated that the determination that the money orders were counterfeit was a conclusion made by a third party institution, whose representatives did not testify at trial. Forrester v. State, No. A11A2343, 2012 Ga. App. LEXIS 301 (Mar. 19, 2012).

Other crimes evidence admissible as part of res gestae. — In a prosecution for felony forgery, a witness's testimony that, just prior to the charged offense, the defendant had tried to induce the witness to cash forged checks and that the witness saw the defendant use an accomplice to cash forged checks, was properly admitted as res gestae evidence because the testimony showed the planning process for the forgeries in question. Chandler v. State, 311 Ga. App. 86, 714 S.E.2d 597 (2011), cert. denied, No. S11C1861, 2011 Ga. LEXIS 985 (Ga. 2011).

Offense involves dishonesty or false statement and admissible in child molestation trial. — Defendant's prior convictions for felony forgery, O.C.G.A. § 16-9-1(a), misdemeanor theft by deception, O.C.G.A. § 16-8-3(a), and misdemeanor giving a false name to a law enforcement officer, O.C.G.A. § 16-10-25, were all less than 10 years old and involved dishonesty or false statements. Therefore, those convictions were admissible in the defendant's child molestation trial under O.C.G.A. § 24-9-84.1(b). Damerow v. State, 310 Ga. App. 530, 714 S.E.2d 82 (2011).

16-9-2. Penalties for forgery.

(a) A person who commits the offense of forgery in the first degree shall be guilty of a felony and, upon conviction thereof, shall be punished by imprisonment for not less than one nor more than 15 years.

(b) A person who commits the offense of forgery in the second degree shall be guilty of a felony and, upon conviction thereof, shall be punished by imprisonment for not less than one nor more than five years.

(c) A person who commits the offense of forgery in the third degree shall be guilty of a felony and, upon conviction thereof, shall be punished by imprisonment for not less than one nor more than five years.

(d) A person who commits the offense of forgery in the fourth degree shall be guilty of a misdemeanor; provided, however, that upon the third and all subsequent convictions for such offense, the defendant shall be guilty of a felony and shall be punished by imprisonment for not less than one nor more than five years. (Code 1933, § 26-1702, enacted by Ga. L. 1968, p. 1249, § 1; Ga. L. 1969, p. 857, § 6; Ga. L. 1982, p. 3, § 16; Ga. L. 2012, p. 899, § 3-5/HB 1176.)

The 2012 amendment, effective July 1, 2012, substituted the present provisions of subsection (a) for the former provisions, which read: "A person commits the offense of forgery in the second degree when with the intent to defraud he knowingly makes, alters, or possesses any writing in a fictitious name or in such manner that the writing as made or altered purports to have been made by another person, at another time, with different provisions, or by authority of one who did not give such authority."; in subsection (b), substituted "who commits" for "convicted of" and inserted "guilty of a felony and, upon conviction thereof, shall be" near the middle; and added subsections (c) and (d). See editor's note for applicability.

Editor's notes. — Ga. L. 2012, p. 899, § 9-1(a)/HB 1176, not codified by the General Assembly, provides: "This Act shall become effective on July 1, 2012, and shall apply to offenses which occur on or after that date. Any offense occurring before July 1, 2012, shall be governed by the statute in effect at the time of such offense and shall be considered a prior conviction for the purpose of imposing a sentence that provides for a different penalty for a subsequent conviction for the same type of offense, of whatever degree or level, pursuant to this Act."

16-9-3. "Writing" defined.

Reserved. Repealed by Ga. L. 2012, p. 899, § 3-5/HB 1176, effective July 1, 2012.

Editor's notes. — This Code section was based on Code 1933, § 26-1703, enacted by Ga. L. 1968, p. 1249, § 1.

ARTICLE 2

DEPOSIT ACCOUNT FRAUD

16-9-20. Deposit account fraud.

(a) A person commits the offense of deposit account fraud when such person makes, draws, utters, executes, or delivers an instrument for the payment of money on any bank or other depository in exchange for a present consideration or wages, knowing that it will not be honored by the drawee. For the purposes of this Code section, it is prima-facie evidence that the accused knew that the instrument would not be honored if:

(1) The accused had no account with the drawee at the time the instrument was made, drawn, uttered, or delivered;

(2) Payment was refused by the drawee for lack of funds upon presentation within 30 days after delivery and the accused or someone for him or her shall not have tendered the holder thereof the amount due thereon, together with a service charge, within ten days after receiving written notice that payment was refused upon such instrument. For purposes of this paragraph:

(A) Notice mailed by certified or registered mail or statutory overnight delivery evidenced by return receipt to the person at the address printed on the instrument or given at the time of issuance shall be deemed sufficient and equivalent to notice having been received as of the date on the return receipt by the person making, drawing, uttering, executing, or delivering the instrument. A single notice as provided in subparagraph (B) of this paragraph shall be sufficient to cover all instruments on which payment was refused and which were delivered within a ten-day period by the accused to a single entity, provided that the form of notice lists and identifies each instrument; and

(B) The form of notice shall be substantially as follows:

"You are hereby notified that the following instrument(s)

Number	Date	Amount	Name of Bank
_____	_____	_____	_____
_____	_____	_____	_____
_____	_____	_____	_____
_____	_____	_____	_____

drawn upon _____ and payable to _____, (has) (have) been dishonored. Pursuant to Georgia law, you have ten days from receipt of this notice to tender payment of the total amount of the instrument(s) plus the applicable service charge(s) of $_____ and any fee charged to the holder of the instrument(s) by a bank or financial institution as a result of the instrument(s) not being honored, the total amount due being _____ dollars and _____ cents. Unless this amount is paid in full within the specified time above, a presumption in law arises that you delivered the instrument(s) with the intent to defraud and the dishonored instrument(s) and all other available information relating to this incident may be submitted to the magistrate for the issuance of a criminal warrant or citation or to the district attorney or solicitor-general for criminal prosecution."; or

(3) Notice mailed by certified or registered mail or statutory overnight delivery is returned undelivered to the sender when such notice was mailed within 90 days of dishonor to the person at the address printed on the instrument or given by the accused at the time of issuance of the instrument.

(b)(1) Except as provided in paragraphs (2) and (3) of this subsection and subsection (c) of this Code section, a person convicted of the offense of deposit account fraud shall be guilty of a misdemeanor and, upon conviction thereof, shall be punished as follows:

(A) When the instrument is for less than $500.00, a fine of not more than $500.00 or imprisonment not to exceed 12 months, or both;

(B) When the instrument is for $500.00 or more but less than $1,000.00, a fine of not more than $1,000.00 or imprisonment not to exceed 12 months, or both; or

(C) When more than one instrument is involved and such instruments were drawn within 90 days of one another and each is in an amount less than $500.00, the amounts of such separate instruments may be added together to arrive at and be punishable under subparagraph (B) of this paragraph.

(2) Except as provided in paragraph (3) of this subsection and subsection (c) of this Code section, a person convicted of the offense of deposit account fraud, when the instrument is for an amount of not less than $1,000.00 nor more than $1,499.99, shall be guilty of a misdemeanor of a high and aggravated nature. When more than one instrument is involved and such instruments were given to the same

entity within a 15 day period and the cumulative total of such instruments is not less than $1,000.00 nor more than $1,499.00, the person drawing and giving such instruments shall upon conviction be guilty of a misdemeanor of a high and aggravated nature.

(3) Except as provided in subsection (c) of this Code section, a person convicted of the offense of deposit account fraud, when the instrument is for $1,500.00 or more, shall be guilty of a felony and, upon conviction thereof, shall be punished by a fine of not less than $500.00 nor more than $5,000.00 or by imprisonment for not more than three years, or both.

(4) Upon conviction of a first or any subsequent offense under this subsection or subsection (c) of this Code section, in addition to any other punishment provided by this Code section, the defendant shall be required to make restitution of the amount of the instrument, together with all costs of bringing a complaint under this Code section. The court may require the defendant to pay as interest a monthly payment equal to 1 percent of the amount of the instrument. Such amount shall be paid each month in addition to any payments on the principal until the entire balance, including the principal and any unpaid interest payments, is paid in full. Such amount shall be paid without regard to any reduction in the principal balance owed. Costs shall be determined by the court from competent evidence of costs provided by the party causing the criminal warrant or citation to issue; provided, however, that the minimum costs shall not be less than $25.00. Restitution may be made while the defendant is serving a probated or suspended sentence.

(c) A person who commits the offense of deposit account fraud by the making, drawing, uttering, executing, or delivering of an instrument on a bank of another state shall be guilty of a felony and, upon conviction thereof, shall be punished by imprisonment for not less than one nor more than five years or by a fine in an amount of up to $1,000.00, or both.

(d) The prosecuting authority of the court with jurisdiction over a violation of subsection (c) of this Code section may seek extradition for criminal prosecution of any person not within this state who flees the state to avoid prosecution under this Code section.

(e) In any prosecution or action under this Code section, an instrument for which the information required in this subsection is available at the time of issuance shall constitute prima-facie evidence of the identity of the party issuing or executing the instrument and that the person was a party authorized to draw upon the named account. To establish this prima-facie evidence, the following information regarding the identity of the party presenting the instrument shall be obtained by

the party receiving such instrument: the full name, residence address, and home phone number.

(1) Such information may be provided by either of two methods:

(A) The information may be recorded upon the instrument itself; or

(B) The number of a check-cashing identification card issued by the receiving party may be recorded on the instrument. The check-cashing identification card shall be issued only after the information required in this subsection has been placed on file by the receiving party.

(2) In addition to the information required in this subsection, the party receiving an instrument shall witness the signature or endorsement of the party presenting such instrument and as evidence of such the receiving party shall initial the instrument.

(f) As used in this Code section, the term:

(1) "Bank" shall include a financial institution as defined in this Code section.

(2) "Conviction" shall include the entering of a guilty plea, the entering of a plea of nolo contendere, or the forfeiting of bail.

(3) "Financial institution" shall have the same meaning as defined in paragraph (21) of Code Section 7-1-4 and shall also include a national bank, a state or federal savings bank, a state or federal credit union, and a state or federal savings and loan association.

(4) "Holder in due course" shall have the same meaning as in Code Section 11-3-302.

(5) "Instrument" means a check, draft, debit card sales draft, or order for the payment of money.

(6) "Present consideration" shall include without limitation:

(A) An obligation or debt of rent which is past due or presently due;

(B) An obligation or debt of state taxes which is past due or presently due;

(C) An obligation or debt which is past due or presently due for child support when made for the support of such minor child and which is given pursuant to an order of court or written agreement signed by the person making the payment;

(D) A simultaneous agreement for the extension of additional credit where additional credit is being denied; and

(E) A written waiver of mechanic's or materialmen's lien rights.

(7) "State taxes" shall include payments made to the Georgia Department of Labor as required by Chapter 8 of Title 34.

(g) This Code section shall in no way affect the authority of a sentencing judge to provide for a sentence to be served on weekends or during the nonworking hours of the defendant as provided in Code Section 17-10-3.

(h)(1) Any party holding a worthless instrument and giving notice in substantially similar form to that provided in subparagraph (a)(2)(B) of this Code section shall be immune from civil liability for the giving of such notice and for proceeding as required under the forms of such notice; provided, however, that, if any person shall be arrested or prosecuted for violation of this Code section and payment of any instrument shall have been refused because the maker or drawer had no account with the bank or other depository on which such instrument was drawn, the one causing the arrest or prosecution shall be deemed to have acted with reasonable or probable cause even though he, she, or it has not mailed the written notice or waited for the ten-day period to elapse. In any civil action for damages which may be brought by the person who made, drew, uttered, executed, or delivered such instrument, no evidence of statements or representations as to the status of the instrument involved or of any collateral agreement with reference to the instrument shall be admissible unless such statements, representations, or collateral agreement shall be written simultaneously with or upon the instrument at the time it is delivered by the maker thereof.

(2) Except as otherwise provided by law, any party who holds a worthless instrument, who complies with the requirements of subsection (a) of this Code section, and who causes a criminal warrant or citation to be issued shall not forfeit his or her right to continue or pursue civil remedies authorized by law for the collection of the worthless instrument; provided, however, that if interest is awarded and collected on any amount ordered by the court as restitution in the criminal case, interest shall not be collectable in any civil action on the same amount. It shall be deemed conclusive evidence that any action is brought upon probable cause and without malice where such party holding a worthless instrument has complied with the provisions of subsection (a) of this Code section regardless of whether the criminal charges are dismissed by a court due to payment in full of the face value of the instrument and applicable service charges subsequent to the date that affidavit for the warrant or citation is made. In any civil action for damages which may be brought by the person who made, drew, uttered, executed, or delivered such instrument, no evidence of statements or representations as to the status of

the instrument involved or of any collateral agreement with reference to the instrument shall be admissible unless such statements, representations, or collateral agreement shall be written simultaneously with or upon the instrument at the time it is delivered by the maker thereof.

(i) Notwithstanding paragraph (2) of subsection (a) of this Code section or any other law on usury, charges, or fees on loans or credit extensions, any lender of money or extender of other credit who receives an instrument drawn on a bank or other depository institution given by any person in full or partial repayment of a loan, installment payment, or other extension of credit may, if such instrument is not paid or is dishonored by such institution, charge and collect from the borrower or person to whom the credit was extended a bad instrument charge. This charge shall not be deemed interest or a finance or other charge made as an incident to or as a condition to the granting of the loan or other extension of credit and shall not be included in determining the limit on charges which may be made in connection with the loan or extension of credit or any other law of this state.

(j) For purposes of this Code section, no service charge or bad instrument charge shall exceed $30.00 or 5 percent of the face amount of the instrument, whichever is greater, except that the holder of the instrument may also charge the maker an additional fee in an amount equal to that charged to the holder by the bank or financial institution as a result of the instrument not being honored.

(k) An action under this Code section may be prosecuted by the party initially receiving a worthless instrument or by any subsequent holder in due course of any such worthless instrument. (Ga. L. 1959, p. 252, §§ 1-3; Code 1933, § 26-1704, enacted by Ga. L. 1968, p. 1249, § 1; Code 1933, § 41A-9909, enacted by Ga. L. 1974, p. 705, § 1; Ga. L. 1975, p. 482, § 1; Ga. L. 1977, p. 1266, §§ 1, 2; Ga. L. 1978, p. 2020, § 1; Ga. L. 1980, p. 1034, § 1; Ga. L. 1980, p. 1147, §§ 1-3; Ga. L. 1981, p. 1550, § 1; Ga. L. 1983, p. 484, § 1; Ga. L. 1983, p. 485, § 1; Ga. L. 1983, p. 1189, §§ 1, 2; Ga. L. 1984, p. 22, § 16; Ga. L. 1984, p. 1435, § 1; Ga. L. 1985, p. 708, § 1; Ga. L. 1986, p. 209, § 1; Ga. L. 1987, p. 983, § 1; Ga. L. 1988, p. 268, § 1; Ga. L. 1988, p. 762, § 1; Ga. L. 1989, p. 1570, § 1; Ga. L. 1990, p. 8, § 16; Ga. L. 1994, p. 1787, § 3; Ga. L. 1995, p. 910, §§ 1, 2; Ga. L. 1996, p. 748, § 10; Ga. L. 1996, p. 1014, §§ 1, 2; Ga. L. 1999, p. 720, § 1; Ga. L. 2000, p. 1352, § 1; Ga. L. 2000, p. 1589, § 4; Ga. L. 2003, p. 140, § 16; Ga. L. 2003, p. 478, § 1; Ga. L. 2012, p. 899, § 3-6/HB 1176.)

The 2012 amendment, effective July 1, 2012, throughout paragraphs (b)(1) and (b)(2), substituted "$500.00" for "$100.00", substituted "$1,000.00" for "$300.00", and substituted "$1,499.00" for "$499.99"; and substituted "$1,500.00" for "$500.00" in paragraph (b)(3). See editor's note for applicability.

Editor's notes. — Ga. L. 2012, p. 899, § 9-1(a)/HB 1176, not codified by the General Assembly, provides: "This Act shall become effective on July 1, 2012, and shall apply to offenses which occur on or after that date. Any offense occurring before July 1, 2012, shall be governed by the statute in effect at the time of such offense and shall be considered a prior conviction for the purpose of imposing a sentence that provides for a different penalty for a subsequent conviction for the same type of offense, of whatever degree or level, pursuant to this Act."

ARTICLE 4

FRAUD AND RELATED OFFENSES

16-9-58. Failing to pay for natural products or chattels.

JUDICIAL DECISIONS

Construction. — Plain language of O.C.G.A. § 16-9-58 criminalizes acting with fraudulent intent to buy the enumerated items and failing or refusing to pay for those items within a certain time, and the crime is not complete until the failure or refusal to pay occurs. Babbitt v. State, 314 Ga. App. 115, 723 S.E.2d 10 (2012).

Venue. — Trial court did not err in denying the defendant's motion to dismiss an indictment charging the defendant with arranging to buy cattle and failing or refusing to pay the seller in violation of O.C.G.A. § 16-9-58 on the ground that venue did not lie in Laurens County because there was some evidence that the place of payment was at the seller's location in Laurens County and that the defendant wrongfully failed or refused to pay the seller in Laurens County for the cattle; even if the defendant's fraudulent intent arose in Kansas sometime after the cattle were shipped, the crime was not consummated until the defendant failed or refused to pay. Babbitt v. State, 314 Ga. App. 115, 723 S.E.2d 10 (2012).

Venue. — Trial court did not err in denying the defendant's motion to dismiss an indictment charging the defendant with arranging to buy cattle and failing or refusing to pay the seller in violation of O.C.G.A. § 16-9-58 because the stipulated facts did not include that the transaction at issue included an explicit due date under the terms of a written contract; O.C.G.A. § 16-9-58 does not specify that it pertains only to "cash sales," nor does it turn on when title passes to the buyer because the statute was specifically revised to extend its application to "all sales," and payment must be made within 20 days following receipt of such products or chattels or by such other payment due date explicitly stated in a written contract, whichever is later. Babbitt v. State, 314 Ga. App. 115, 723 S.E.2d 10 (2012).

ARTICLE 6

COMPUTER SYSTEMS PROTECTION

PART 1

COMPUTER CRIMES

Law reviews. — For article, "Intellectual Property Checklist for Marketing the Recording Artist Online," see 18 J. Intell. Prop. L. 541 (2011).

16-9-92. Definitions.

JUDICIAL DECISIONS

Without authority.
Trial court did not err in denying a former employee's claims under the Georgia Computer Systems Protection Act, O.C.G.A. § 16-9-93, because the actions of a former employer's president in perusing the employee's email on the computer that the employee used in conducting business for the employer were not taken without authority; the president had authority to inspect the employee's computer pursuant to the computer usage policy contained in the employee manual, which the employee had agreed to abide by when the employee started work with the employer, and the president acted in order to obtain evidence in connection with an investigation of improper employee behavior. Sitton v. Print Direction, Inc., 312 Ga. App. 365, 718 S.E.2d 532 (2011).

16-9-93. Computer crimes defined; exclusivity of article; civil remedies; criminal penalties.

JUDICIAL DECISIONS

Claim did not state a violation.
Trial court did not err in denying a former employee's claims under the Georgia Computer Systems Protection Act, O.C.G.A. § 16-9-93, because the actions of a former employer's president in perusing the employee's email on the computer that the employee used in conducting business for the employer were not taken without authority; the president had authority to inspect the employee's computer pursuant to the computer usage policy contained in the employee manual, which the employee had agreed to abide by when the employee started work with the employer, and the president acted in order to obtain evidence in connection with an investigation of improper employee behavior. Sitton v. Print Direction, Inc., 312 Ga. App. 365, 718 S.E.2d 532 (2011).

ARTICLE 8

IDENTITY FRAUD

16-9-120. Definitions.

JUDICIAL DECISIONS

Conviction upheld.
Defendant was properly convicted of financial identity fraud in violation of O.C.G.A. § 16-9-120 because the circumstantial evidence was sufficient to authorize a jury to find that the defendant, either directly or as a party to a crime under O.C.G.A. § 16-2-20, committed financial identity fraud by accessing the resources of the victims through the use of identifying information without the authorization or permission of the victims, with the intent to unlawfully appropriate their resources to the defendant's own use; the federal tax identification number of either victim was required as part of the credit card application to obtain temporary charge passes, which the defendant used to purchase thousands of dollars worth of merchandise in a short period of time. Zachery v. State, 312 Ga. App. 418, 718 S.E.2d 332 (2011).

16-9-121. Elements of offense.

JUDICIAL DECISIONS

Evidence sufficient for conviction. Defendant was properly convicted of financial identity fraud in violation of O.C.G.A. § 16-9-120 because the circumstantial evidence was sufficient to authorize a jury to find that the defendant, either directly or as a party to a crime under O.C.G.A. § 16-2-20, committed financial identity fraud by accessing the resources of the victims through the use of identifying information without the authorization or permission of the victims, with the intent to unlawfully appropriate the victim's resources to the defendant's own use; the federal tax identification number of either victim was required as part of the credit card application to obtain temporary charge passes, which the defendant used to purchase thousands of dollars worth of merchandise in a short period of time. Zachery v. State, 312 Ga. App. 418, 718 S.E.2d 332 (2011).

16-9-121.1. Offense of aggravated identity fraud.

Law reviews. — For article on the 2011 enactment of this Code section, see 28 Ga. St. U. L. Rev. 35 (2011). For article, "State Government: Illegal Immigration Reform and Enforcement Act of 2011," see 28 Ga. St. U. L. Rev. 51 (2011).

OPINIONS OF THE ATTORNEY GENERAL

Enforcement by investigators of Enforcement Division of the State Board of Workers' Compensation. — Investigators of the Enforcement Division who are certified as peace officers may enforce the aggravated identity fraud statute, O.C.G.A. § 16-9-121.1, by arrest and the execution of search warrants provided that the arrest and search is the result of a criminal investigation of an alleged violation of the workers' compensation laws of O.C.G.A. Ch. 9, T. 34. 2012 Op. Att'y Gen. No. 12-3.

16-9-125. County of offense.

JUDICIAL DECISIONS

Venue established. — State established venue under Ga. Const. 1983, Art. VI, Sec. II, Para. VI and O.C.G.A. §§ 16-9-125 and 17-2-2(a) because a reasonable trier of fact was authorized to find beyond a reasonable doubt that the victims resided or were found in Forsyth County at the time the offense of financial identity fraud was committed as alleged in the indictment; the victim testified that the victim had been a resident of Forsyth County for twelve years and that the victim's company had been located there for seventeen years. Zachery v. State, 312 Ga. App. 418, 718 S.E.2d 332 (2011).

16-9-126. Penalty for violations.

Law reviews. — For article on the 2011 amendment of this Code section, see 28 Ga. St. U. L. Rev. 35 (2011).

16-9-128. Exemptions.

Law reviews. — For article on the 2011 amendment of this Code section, see 28 Ga. St. U. L. Rev. 35 (2011).

16-9-130. Damages available to consumer victim; no defense that others engage in comparable practices; service of complaint.

Law reviews. — For article, "Overcoming Under-Compensation and Under-Deterrence in Intentional Tort Cases: Are Statutory Multiple Damages the Best Remedy?," see 62 Mercer L. Rev. 449 (2011).

CHAPTER 10

OFFENSES AGAINST PUBLIC ADMINISTRATION

Article 2

Obstruction of Public Administration and Related Offenses

Sec.

16-10-20.1. Filing false liens or encumbrances against public employees.

16-10-34. Use of laser devices against law enforcement officer.

Article 5

Offenses Related to Judicial and Other Proceedings

Sec.

16-10-97. Intimidation or injury of juror, court officer, or law enforcement officer.

ARTICLE 1

ABUSE OF GOVERNMENTAL OFFICE

16-10-2. Bribery.

ADVISORY OPINIONS OF THE STATE BAR

Committing offense results in Rules of Professional Conduct violation. — If an attorney were to indicate to an officer that as a result of the attorney's position as a member of the city council a favorable recommendation as to one of the attorney's clients would result in benefits flowing to the officer, or that an unfavorable recommendation would result in harm, the attorney would have committed the offense of bribery, OCGA §16-10-2 (a)(1), or extortion, OCGA §16-8-16(a)(4). The attorney would also have violated Rule 3.5(a) of the Georgia Rules of Professional Conduct. Adv. Op. No. 05-12 (July 25, 2006).

16-10-6. Sale of real or personal property to political subdivision by local officer or employee; exceptions; limitation of civil liability.

JUDICIAL DECISIONS

Ordinance did not preempt statute. — Miller County, Ga., Ordinance No. 10-01, § 3 does not purport to supplant O.C.G.A. § 16-10-6 because the effect of § 3 is to strengthen O.C.G.A. § 16-10-6 by a broader prohibition with additional specific requirements for any exception; the county had authority, as an incident of the county's home rule power, to enact Miller County, Ga., Ordinance No. 10-01, § 3 so long as the ordinance did not conflict with general law. Bd. of Comm'rs v. Callan, 290 Ga. 327, 720 S.E.2d 608 (2012).

ARTICLE 2

OBSTRUCTION OF PUBLIC ADMINISTRATION AND RELATED OFFENSES

16-10-20. False statements and writings, concealment of facts, and fraudulent documents in matters within jurisdiction of state or political subdivisions.

JUDICIAL DECISIONS

Constitutionality.

False statement statute, O.C.G.A. § 16-10-20, when properly construed to require that the defendant make the false statement with knowledge and intent that the statement may come within the jurisdiction of a state or local government agency, is constitutional because correctly interpreted, the statute raises no substantial constitutional concern on the statute's face; the statute requires a defendant to know and intend, that is, to contemplate or expect, that his or her false statement will come to the attention of a state or local department or agency with the authority to act on the statement, and as properly construed, O.C.G.A. § 16-10-20 may only be applied to conduct that persons of common intelligence would know was wrongful because the statement could result in harm to the government. Haley v. State, 289 Ga. 515, 712 S.E.2d 838 (2011).

False statement to government agency.

O.C.G.A. § 16-10-20 requires proof that the defendant knowingly and willfully made a false statement and that he or she knowingly and willfully did so in a matter within the jurisdiction of a state or local department or agency, but this does not require proof that the defendant made the false statement directly to the government agency, although in such cases it would normally be undisputed that the defendant knew and intended that the statement came within the jurisdiction of the agency; however, the statute does require the defendant to have made the false statement in some intended relationship to a matter within the state or local agency's jurisdiction, that is, to have contemplated that the statement would come to the attention of an agency with the authority to act on the statement. Furthermore, knowingly and willfully making a false statement in a matter within a government agency's jurisdiction is a lie that threatens to deceive and thereby harm the government, if only because the government may need to expend time and resources to determine the truth. Haley v. State, 289 Ga. 515, 712 S.E.2d 838 (2011).

False statement to police.

Trial judge's explanation to a defendant's counsel that based on counsel's questioning of an investigator regarding

the defendant's statement to the investigator that the defendant lived in Florida, the judge was going to expand the indictment to include falsifying or concealing a material fact, which was one possible violation of O.C.G.A. § 16-10-20, when the defendant had only been charged with making a false statement, did not constitute an improper remark under O.C.G.A. § 17-8-57 because it was a colloquy with counsel regarding possible jury charges and did not express an opinion on what had or had not been proved. Adams v. State, 312 Ga. App. 570, 718 S.E.2d 899 (2011), cert. denied, 2012 Ga. LEXIS 263 (Ga. 2012).

Requirements for state to prove.

State proved that the false statement alleged in the indictment was made in a matter within the jurisdiction of the Georgia Bureau of Investigation (GBI) because the GBI was actively investigating a missing person case; because two videos contained clues referencing a Georgia missing person and the location of a missing person's body parts in Augusta, and it was then determined that the computer from which the videos were being posted was in Georgia, the jury could reasonably infer that the other missing person cases referenced in the first video would have a Georgia connection, giving the GBI jurisdiction to investigate the cases. Haley v. State, 289 Ga. 515, 712 S.E.2d 838 (2011).

16-10-20.1. Filing false liens or encumbrances against public employees.

(a) As used in this Code section, the term:

(1) "Public employee" means every person employed by the executive, legislative, or judicial branch of state government, or any department, board, bureau, agency, commission, or authority thereof, and any person employed by a county, municipality, consolidated government, or local board of education.

(2) "Public officer" shall have the same meaning as set forth in Code Section 21-5-3.

(b) Notwithstanding Code Sections 16-10-20 and 16-10-71, it shall be unlawful for any person to knowingly file a false lien or encumbrance in a public record or private record that is generally available to the public against the real or personal property of a public officer or public employee on account of the performance of such public officer or public employee's official duties, knowing or having reason to know that such lien or encumbrance is false or contains a materially false, fictitious, or fraudulent statement or representation.

(c) Any person who violates subsection (b) of this Code section shall be guilty of a felony and, upon conviction thereof, shall be punished by imprisonment of not less than one nor more than ten years, a fine not to exceed $10,000.00, or both. (Code 1981, § 16-10-20.1, enacted by Ga. L. 2012, p. 90, § 1/HB 997.)

Effective date. — This Code section became effective July 1, 2012.

Cross references. — Public officers and employees, T. 45.

16-10-24. Obstructing or hindering law enforcement officers.

JUDICIAL DECISIONS

Analysis

General Consideration

Civil rights action. — In a 42 U.S.C. § 1983 case in which a pro se inmate appealed a district court's 28 U.S.C. § 1915A dismissal of the inmate's claims for false arrest and false imprisonment as barred by the Heck decision, the district court's dismissal was premature since the inmate had not been convicted of violating O.C.G.A. § 16-10-24 when the district court conducted the court's frivolity review. Nonetheless, the error was harmless since the inmate failed to demonstrate that the inmate's conviction under § 16-10-24 had been reversed or invalidated; the inmate's claims for false arrest and false imprisonment were now barred by the Heck decision. Taylor v. Freeman, No. 10-13573, 2011 U.S. App. LEXIS 22997 (11th Cir. Nov. 16, 2011) (Unpublished).

Issue waived on appeal regarding legitimacy of arrest. — Defendant waived the right to challenge the sufficiency of the evidence regarding whether a police officer was in the lawful discharge of official duties for purposes of the defendant's conviction for misdemeanor obstruction of a law enforcement officer, in violation of O.C.G.A. § 16-10-24(a), as defense counsel conceded at trial that the officer's arrest was "legitimate," and no action was taken to suggest otherwise. Jenkins v. State, 310 Ga. App. 811, 714 S.E.2d 410 (2011).

Cited in Myers v. State, 311 Ga. App. 668, 716 S.E.2d 772 (2011); Foster v. State, No. A11A2312, 2012 Ga. App. LEXIS 249 (Mar. 7, 2012).

Lawful Discharge of Official Duties

Officer's act of clearing an area. — Using profanity, an arrestee challenged an officer's authority to clear an area (as the officer had been instructed by a judge), thus, the officer could arguably, if mistakenly, think probable cause existed for misdemeanor obstruction under O.C.G.A. § 16-10-24(a) and qualified immunity entitled the officer to summary judgment on an illegal arrest claim. Spruell v. Harper, No. 1:09-CV-356-TWT, 2011 U.S. Dist. LEXIS 31492 (N.D. Ga. Mar. 25, 2011).

Knowledge

Defendant saw uniformed officer. — Evidence that the defendant and another were carrying stolen items toward a police officer's car and that they dropped the items and ran when they realized it was a police car, despite a uniformed officer shouting at them to stop, was sufficient to convict the defendant of burglary and obstruction of justice in violation of O.C.G.A. §§ 16-7-1(a) and 16-10-24(a). Mitchell v. State, 312 Ga. App. 293, 718 S.E.2d 126 (2011).

Application

Flight, or attempted flight, etc.

Defendant's probation was properly revoked for obstructing an officer in violation of O.C.G.A. § 16-10-24(a). The officers' detention of the defendant was a second-tier encounter because the officers had an articulable suspicion of criminal activity based on the defendant's matching the description and being in the area of an armed robbery; therefore, the defendant was not free to leave the encounter as the defendant did. Avery v. State, 313 Ga. App. 259, 721 S.E.2d 202 (2011).

Eluding and hiding from police sufficient to support criminal trespass count. — Criminal trespass count of a defendant's indictment was sufficient be-

cause the indictment alleged that the defendant was attempting to elude and hide from a police officer when the defendant committed the trespass, which was a crime under O.C.G.A. § 16-10-24(a). Scruggs v. State, 309 Ga. App. 569, 711 S.E.2d 86 (2011).

Probable cause shown to arrest.

When an initial stop was lawful and the defendant failed to stop when ordered to do so, there was probable cause to believe O.C.G.A. § 16-10-24(a) was violated and the defendant's apprehension and arrest did not violate the Fourth Amendment. United States v. Foskey, No. 10-15221, 2012 U.S. App. LEXIS 374 (11th Cir. Jan. 9, 2012) (Unpublished).

Sufficient evidence for conviction.

Evidence was sufficient to permit a rational trier of fact to find the defendant guilty of felony obstruction of a law enforcement officer in violation of O.C.G.A. § 16-10-24(b) because the defendant bit two officers and kicked one several times in the abdomen as the officers were attempting to arrest the defendant; so, the evidence clearly established that the defendant was "offering or doing violence" to the officers at the time of the obstruction. White v. State, 310 Ga. App. 386, 714 S.E.2d 31 (2011).

Defendant's conviction for misdemeanor obstruction of a law enforcement officer, in violation of O.C.G.A. § 16-10-24(a), was supported by sufficient evidence as the defendant was advised by an officer that the defendant was under arrest, whereupon the defendant resisted the officer's handcuffing attempts, ran from the officer, and failed to comply with the directive to stop. Jenkins v. State, 310 Ga. App. 811, 714 S.E.2d 410 (2011).

Evidence that police responded to a home to investigate a crime after speaking to an injured man, that the officer saw the defendant standing with the defendant's hands concealed in a baggy jacket and instructed the defendant, whom the officer thought might be armed, to display the defendant's hands, and that the defendant failed to comply and attacked the officer supported the defendant's conviction for felony obstruction of an officer. Alvarez v. State, 312 Ga. App. 552, 718 S.E.2d 884 (2011).

Sentence not unconstitutional. — Defendant's sentence for obstruction of a law enforcement officer of 12 months confinement to be served on probation following 60 days of confinement, $1,500 in fines, 100 hours of community service, and a mental health evaluation was within the statutory limits set by O.C.G.A. §§ 16-10-24(b), 40-2-20(c), and 40-6-10(b), and did not shock the conscience. Smith v. State, 311 Ga. App. 184, 715 S.E.2d 434 (2011).

Jury Instructions

Instruction on offering to do or doing violence.

In defendant's trial for felony obstruction of an officer, in violation of O.C.G.A. § 16-10-24, the state did not introduce evidence that the defendant did violence to the officer on the date in question other than by striking the officer with a motor vehicle and, as such, no due process violation occurred in the giving of the jury instructions because there was no reasonable probability that the jury convicted the defendant for obstructing the police officer in a manner not specified in the indictment. Fairwell v. State, 311 Ga. App. 834, 717 S.E.2d 332 (2011).

Instruction not authorized by evidence.

Trial court did not err in denying the defendant's request to charge the jury on misdemeanor obstruction as a lesser included offense of felony obstruction of a law enforcement officer, O.C.G.A. § 16-10-24(b), because such a charge was not warranted by the evidence; the evidence plainly showed the completion of the greater offense, obstruction that involved "offering or doing violence" to an officer. White v. State, 310 Ga. App. 386, 714 S.E.2d 31 (2011).

Charge on entire section not error. — Defendant's trial counsel was not ineffective in failing to object to a jury charge on the entire obstruction code section, O.C.G.A. § 16-10-24, although there was no evidence that the defendant offered or threatened violence. The trial court instructed the jury to consider the evidence in light of the charges in the indictment. Williams v. State, 309 Ga. App. 688, 710 S.E.2d 884 (2011).

16-10-25. Giving false name, address, or birthdate to law enforcement officer.

JUDICIAL DECISIONS

Offense involves dishonesty or false statement and admissible in child molestation trial. — Defendant's prior convictions for felony forgery, O.C.G.A. § 16-9-1(a), misdemeanor theft by deception, O.C.G.A. § 16-8-3(a), and misdemeanor giving a false name to a law enforcement officer, O.C.G.A. § 16-10-25, were all less than 10 years old and involved dishonesty or false statements. Therefore, those convictions were admissible in the defendant's child molestation trial under O.C.G.A. § 24-9-84.1(b). Damerow v. State, 310 Ga. App. 530, 714 S.E.2d 82 (2011).

16-10-32. Attempted murder or threatening of witnesses in official proceedings.

JUDICIAL DECISIONS

Evidence insufficient to support conviction. — During an intake interview at a mental health evaluation facility, a defendant's threats regarding the defendant's sentencing judge were made for the purpose of diagnosis and treatment of mental health issues, not with the purpose of terrorizing the judge or intimidating the judge from attending legal proceedings as required for finding terroristic threats in violation of O.C.G.A. §§ 16-10-32(b) and 16-11-37(a). Koldewey v. State, 310 Ga. App. 788, 714 S.E.2d 371 (2011), cert. denied, 2012 Ga. LEXIS 239 (Ga. 2012).

16-10-34. Use of laser devices against law enforcement officer.

(a) For purposes of this Code section, the term "laser device" means a device designed to amplify electromagnetic radiation by stimulated emission that emits a beam designed to be used by the operator as a pointer or highlighter to indicate, mark, or identify a specific position, place, item, or object. Such term also means a device that projects a beam or point of light by means of light amplification by stimulated emission of radiation or other means or that emits light which simulates the appearance of a beam of light.

(b) It shall be unlawful for any person to knowingly and intentionally project upon a law enforcement officer any laser device without such officer's permission if:

(1) The law enforcement officer is lawfully acting within the course and scope of employment; and

(2) The person has knowledge or reason to know that the law enforcement officer is employed as:

(A) A peace officer as defined in paragraph (8) of Code Section 35-8-2;

(B) A probation officer, or other employee with the power of arrest, by the Department of Corrections;

(C) A parole supervisor, or other employee with the power of arrest, by the State Board of Pardons and Paroles;

(D) A jail officer or guard by a county or municipality and has the responsibility of supervising inmates who are confined in a county or municipal jail or other detention facility; or

(E) A juvenile correctional officer by the Department of Juvenile Justice and has the primary responsibility for the supervision and control of youth confined in such department's programs and facilities.

(c) Any person who violates subsection (b) of this Code section shall be guilty of a high and aggravated misdemeanor.

(d) It shall not be a defense to a prosecution for a violation of this Code section that the laser device was pointed at such officer through a glass, window, or other transparent or translucent object.

(e) Each violation of this Code section shall constitute a separate offense. A sentence imposed under this Code section may be imposed separately from and consecutive to or concurrent with a sentence for any other offense related to the act or acts establishing the offense under this Code section. (Code 1981, § 16-10-34, enacted by Ga. L. 2012, p. 1142, § 1/SB 441.)

Effective date. — This Code section became effective July 1, 2012. See editor's note for applicability.

Editor's notes. — Ga. L. 2012, p. 1142, § 3/SB 441, not codified by the General Assembly, provides that this Code section applies to offenses committed on or after July 1, 2012.

ARTICLE 3

ESCAPE AND OTHER OFFENSES RELATED TO CONFINEMENT

16-10-50. Hindering apprehension or punishment of criminal.

JUDICIAL DECISIONS

An accessory after the fact cannot be an accomplice to the major crime. Defendant's conviction for hindering the apprehension of a criminal in violation of O.C.G.A. § 16-10-50 had to be set aside because defendant could not be convicted for both malice murder and hindering the apprehension of a criminal, which was the equivalent of the common law crime of being an accessory after the fact; a party cannot be convicted both of being a principal to the crime and an accessory after the fact. Hampton v. State, 289 Ga. 621, 713 S.E.2d 851 (2011).

16-10-51. Bail jumping.

Law reviews. — For article, "Crimes and Offenses," see 27 Ga. St. U. L. Rev. 131 (2011).

16-10-52. Escape.

JUDICIAL DECISIONS

ANALYSIS

APPLICATION

Application

Defendant in house arrest program is in lawful custody or confinement. — Defendant participating in an electronically-monitored house arrest program is in lawful custody or lawful confinement, as provided in O.C.G.A. § 16-10-52, because the General Assembly explicitly recognized a defendant's home as a place where he or she could be kept within bounds or restricted in movement for purposes of the electronic pretrial release program. Brown v. State, 314 Ga. App. 1, 723 S.E.2d 112 (2012).

Evidence sufficient.

Evidence was sufficient to authorize a rational trier of fact to find the defendant guilty of escape beyond a reasonable doubt because the defendant was in a state of being restricted to or detained within the defendant's home, under the guard of an electronic monitor, and the defendant violated the conditions of the house arrest order by removing the monitor and leaving town. Brown v. State, 314 Ga. App. 1, 723 S.E.2d 112 (2012).

ARTICLE 4

PERJURY AND RELATED OFFENSES

16-10-70. Perjury.

JUDICIAL DECISIONS

ANALYSIS

MATERIALITY

Materiality

False statement was material. — In a prosecution for perjury under O.C.G.A. § 16-10-70, there was sufficient evidence for a rational trier of fact to find beyond a reasonable doubt that the defendant's false statement given in the defendant's trial on a charge of running a red light about the location of the officer's patrol car was material as the defendant's false statement went to the issue of whether the officer could have observed the alleged red light violation and, thus, whether the officer's testimony was credible. As such, the defendant's testimony clearly could have influenced the jury's decision over whether the defendant actually ran the red light. Walker v. State, No. A11A2293, 2012 Ga. App. LEXIS 193 (Feb. 24, 2012).

ARTICLE 5

OFFENSES RELATED TO JUDICIAL AND OTHER PROCEEDINGS

16-10-93. Influencing witnesses.

JUDICIAL DECISIONS

Threatening to file lawsuit not within ambit of statute. — Defendant was improperly convicted of influencing witnesses in violation of O.C.G.A. § 16-10-93(a) because the mere threat of potential monetary damage and public humiliation were inextricably intertwined with the defendant's threat of a lawsuit, which was not a per se threat to person nor to property; threatening to (ostensibly) exercise one's legitimate right to file a lawsuit is not encompassed by this statute. DeLong v. State, 310 Ga. App. 518, 714 S.E.2d 98 (2011).

16-10-94. Tampering with evidence.

JUDICIAL DECISIONS

Evidence insufficient to sustain conviction.

Evidence was not sufficient to support the defendant's conviction for tampering with evidence with intent to prevent the apprehension and obstruct the prosecution of another person in violation of O.C.G.A. § 16-10-94 because the evidence did not prove beyond a reasonable doubt that the defendant created and posted a video with the specific intent to prevent the apprehension or obstruct the prosecution of some other person. Haley v. State, 289 Ga. 515, 712 S.E.2d 838 (2011).

Felony sentence vacated. — Defendant's felony sentence for tampering with evidence in violation of O.C.G.A. § 16-10 -94 was vacated and the case was remanded for misdemeanor sentencing because the verdict form simply contained a finding of guilty on the tampering count, making it impossible to determine if the jury found the defendant guilty of misdemeanor or felony tampering; the defendant had to be given the benefit of the doubt in construing the ambiguous verdict. Hampton v. State, 289 Ga. 621, 713 S.E.2d 851 (2011).

Crime was misdemeanor because tampering involved defendant's own case.

Because the defendant tampered with evidence in the defendant's own case by throwing the murder weapon away, the defendant could only be convicted of a misdemeanor; therefore, the trial court erred in finding the defendant guilty of a felony. DeLeon v. State, 289 Ga. 782, 716 S.E.2d 173 (2011).

16-10-97. Intimidation or injury of juror, court officer, or law enforcement officer.

(a) A person who by threat or force or by any threatening action, letter, or communication:

(1) Endeavors to intimidate or impede any grand juror or trial juror or any officer in or of any court of this state or any court of any county or municipality of this state or any officer who may be serving at any proceeding in any such court while in the discharge of such juror's or officer's duties;

(2) Injures any grand juror or trial juror in his or her person or property on account of any indictment or verdict assented to by him or her or on account of his or her being or having been such juror; or

(3) Injures any officer in or of any court of this state or any court of any county or municipality of this state or any officer who may be serving at any proceeding in any such court in his or her person or property on account of the performance of his or her official duties

shall, upon conviction thereof, be punished by a fine of not more than $5,000.00 or by imprisonment for not more than 20 years, or both.

(b) As used in this Code section, the term "any officer in or of any court" means a judge, attorney, clerk of court, deputy clerk of court, court reporter, or probation officer.

(c) A person who by threat or force or by any threatening action, letter, or communication endeavors to intimidate any law enforcement officer, outside the scope and course of his or her employment, or his or her immediate family member in retaliation or response to the discharge of such officer's official duties shall be guilty of a felony and, upon conviction thereof, shall be punished by imprisonment for not less than one nor more than five years, a fine not to exceed $5,000.00, or both. (Code 1981, § 16-10-97, enacted by Ga. L. 1988, p. 391, § 1; Ga. L. 1989, p. 14, § 16; Ga. L. 1992, p. 6, § 16; Ga. L. 2010, p. 999, § 2/HB 1002; Ga. L. 2011, p. 59, § 1-63/HB 415; Ga. L. 2012, p. 623, § 1/HB 541.)

The 2012 amendment, effective July 1, 2012, in subsection (a), inserted "action" and added a comma following "letter"; and added subsection (c).

CHAPTER 11

OFFENSES AGAINST PUBLIC ORDER AND SAFETY

Article 2

Offenses Against Public Order

Sec.

16-11-45. Use of laser against aircraft.

Article 4

Dangerous Instrumentalities and Practices

PART 3

CARRYING AND POSSESSION OF FIREARMS

Sec.

16-11-131. Possession of firearms by convicted felons and first offender probationers.

16-11-136. Restrictions on possession, manufacture, sale, or transfer of knives.

ARTICLE 2

OFFENSES AGAINST PUBLIC ORDER

16-11-32. Affray.

JUDICIAL DECISIONS

Jail is not a public place. — Defendant's conviction for affray in violation of O.C.G.A. § 16-11-32 was reversed because the altercation occurred in the Hall County Jail, which was not a "public place" as required for conviction pursuant to O.C.G.A. §§ 16-1-3(15) and 16-6-8(d). Singletary v. State, 310 Ga. App. 570, 713 S.E.2d 698 (2011).

16-11-34.1. Preventing or disrupting General Assembly sessions or other meetings of members; unlawful activities within the state capitol or certain Capitol Square buildings.

Law reviews. — For article, "Crimes and Offenses," see 27 Ga. St. U. L. Rev. 131 (2011).

16-11-36. Loitering or prowling.

JUDICIAL DECISIONS

Attempt to enter an automobile did not merge with loitering. — Merging of sentences for attempt to enter an automobile in violation of O.C.G.A. §§ 16-4-1 and 16-8-18, and loitering under O.C.G.A. § 16-11-36 was not warranted because loitering required proof of presence in a place at a time or in a manner not usual for law-abiding individuals, and attempt to enter an automobile required performance of an act which constituted a substantial step toward the commission of entering an automobile, both elements not required by the other crime. Brown v. State, 312 Ga. App. 489, 718 S.E.2d 847 (2011).

Evidence supports conviction, etc. Conviction for loitering under O.C.G.A. § 16-11-36 was upheld based on the defendant, a male, being present in a sorority house parking lot at 2:00 a.m. repeatedly pulling on a vehicle's door handle. Brown v. State, 312 Ga. App. 489, 718 S.E.2d 847 (2011).

16-11-37. Terroristic threats and acts; penalties.

JUDICIAL DECISIONS

Analysis

General Consideration
Corroboration

General Consideration

Sufficient evidence of intent. Defendant was properly convicted of terroristic threats in violation of O.C.G.A. § 16-11-37(a) because the jury was presented with sufficient evidence by which to find that the defendant intended to

terrorize officers by communicating a threat to blow up the defendant's home using propane; although there was testimony that the defendant suffered from a history of mental illness, the defendant did not plead the affirmative defense of insanity, and the issue of the defendant's criminal intent was a question of fact for the jury, which was presented with sufficient evidence to establish the requisite criminal intent. Layne v. State, 313 Ga. App. 608, 722 S.E.2d 351 (2012).

Evidence sufficient for conviction. Defendant's specific and repeat threats to shoot any electric company technicians who ventured onto the defendant's property and the defendant's repeated demands that the defendant's threats be noted in the defendant's account records supported the defendant's convictions for terroristic threats in violation of O.C.G.A. § 16-11-37(a). Nassau v. State, 311 Ga. App. 438, 715 S.E.2d 837 (2011).

Any rational trier of fact could find the defendant guilty beyond a reasonable doubt of terroristic threats, O.C.G.A. § 16-11-37(a), hoax devices, O.C.G.A. § 16-7-85(a), and armed robbery, O.C.G.A. § 16-8-41(a), because although circumstantial, the evidence authorized the jury to exclude every reasonable hypothesis other than that the defendant engaged in the acts that constituted the crimes; even though the defendant was apprehended while wearing clothing that did not match that described by the victims, an officer familiar with the habits of bank robbers testified that bank robbers like to wear multi-layer clothing and then shed clothes after the crime. Williams v. State, 312 Ga. App. 22, 717 S.E.2d 532 (2011).

Evidence sufficient for conviction. — Defendant's conviction for making a terroristic threat was affirmed because evidence showed that the defendant, after an enraged and profane confrontation, angrily returned to the scene to tell the victim that he was a "dead man." This authorized the jury to conclude that the defendant was threatening to kill the victim, which would meet the definition of a terroristic threat. Enuka v. State, 314 Ga. App. 466, 724 S.E.2d 471 (2012).

Threats made for purpose of mental health evaluation insufficient. — During an intake interview at a mental health evaluation facility, a defendant's threats regarding the defendant's sentencing judge were made for the purpose of diagnosis and treatment of mental health issues, not with the purpose of terrorizing the judge or intimidating the judge from attending legal proceedings as required for finding terroristic threats in violation of O.C.G.A. §§ 16-10-32(b) and 16-11-37(a). Koldewey v. State, 310 Ga. App. 788, 714 S.E.2d 371 (2011), cert. denied, 2012 Ga. LEXIS 239 (Ga. 2012).

Jury instructions. Although the trial court erred in instructing the jury on crime of terroristic threats, the error was harmless because there was no reasonable possibility that the defendant was convicted for committing terroristic threats in a manner not averred by the indictment, and the trial court gave complete instructions to the jury during the course of the one-day trial, albeit not in the sequence required by O.C.G.A. § 5-5-24(b); the charge, although not consistent with the indictment, did not reasonably present the jury with an alternate basis for finding the defendant guilty of terroristic threats. Tidwell v. State, 312 Ga. App. 468, 718 S.E.2d 808 (2011), cert. denied, 2012 Ga. LEXIS 277 (Ga. 2012).

Defendant waived the objection to the trial court's decision to recharge the jury on the elements of terroristic threats because the defendant did not object when the trial court announced the proposed recharge and asked for any objections before instructing the jury. Tidwell v. State, 312 Ga. App. 468, 718 S.E.2d 808 (2011), cert. denied, 2012 Ga. LEXIS 277 (Ga. 2012).

Trial court's failure to recharge on corroboration was not plain error under O.C.G.A. § 17-8-58(b) or substantial error that was harmful as a matter of law under O.C.G.A. § 5-5-24(c) because in the court's instructions to the jury following closing argument, the trial court properly charged the jury that no person would be convicted of terroristic threats on the unsupported testimony of the party to whom the threat was made. Tidwell v. State, 312

Ga. App. 468, 718 S.E.2d 808 (2011), cert. denied, 2012 Ga. LEXIS 277 (Ga. 2012).

Corroboration

Evidence sufficient for corroboration.

Any rational trier of fact could have found the defendant guilty of the crime of terroristic threats beyond a reasonable doubt because the victim's testimony was corroborated by independent evidence of the injury to the victim's face and by an officer's testimony that when the officer arrived at the scene the officer saw that the victim was shaking, looked like the victim had been crying, and was scared. Tidwell v. State, 312 Ga. App. 468, 718 S.E.2d 808 (2011), cert. denied, 2012 Ga. LEXIS 277 (Ga. 2012).

Victim's testimony regarding a defendant's terroristic threat to kill the victim by dropping a hair dryer into a filled bathtub with the victim, then forcing the victim to eat the defendant's feces was sufficiently corroborated by evidence of the events before and after the threat including evidence that police found feces and a hair dryer on the floor in the bathroom. Schneider v. State, 312 Ga. App. 504, 718 S.E.2d 833 (2011).

16-11-38. Wearing mask, hood, or device which conceals identity of wearer.

JUDICIAL DECISIONS

Evidence sufficient to support conviction. — There was sufficient evidence to permit a rational trier of fact to conclude beyond a reasonable doubt that the defendant juvenile intended to conceal the defendant's identity and to threaten, intimidate, or provoke the apprehension of violence in violation of the Anti-Mask Act, O.C.G.A. § 16-11-38, because the defendant in a mask and a friend in a hooded sweatshirt stood at the door to a stranger's house and frightened the occupants by standing motionless and silent as to their intentions. In the Interest of I.M.W., 313 Ga. App. 624, 722 S.E.2d 586 (2012).

16-11-45. Use of laser against aircraft.

(a) As used in this Code section, the term:

(1) "Laser" means any device that projects a beam or point of light by means of light amplification by stimulated emission of radiation or a device that emits light which simulates the appearance of a laser.

(2) "Laser pointer" means any device designed or used to amplify electromagnetic radiation by stimulated emission that emits a beam designed to be used by the operator as a pointer or highlighter to indicate, mark, or identify a specific position, place, item, or object.

(b) Except as otherwise provided in subsection (c) of this Code section, whoever knowingly and intentionally aims the beam of a laser pointer, or projects a laser, at an aircraft or at the flight path of an aircraft shall be guilty of a misdemeanor.

(c) Laser or laser pointer airspace uses that have been reviewed and approved by the Federal Aviation Administration are exempt from the provisions of this Code section. (Code 1981, § 16-11-45, enacted by Ga. L. 2012, p. 1142, § 2/SB 441.)

Effective date. — This Code section became effective July 1, 2012. See editor's note for applicability.

Editor's notes. — Ga. L. 2012, p. 1142, § 3/SB 441, not codified by the General Assembly, provides that this Code section applies to offenses committed on or after July 1, 2012.

ARTICLE 3

INVASIONS OF PRIVACY

PART 1

WIRETAPPING, EAVESDROPPING, SURVEILLANCE, AND RELATED OFFENSES

16-11-62. Eavesdropping, surveillance, or intercepting communication which invades privacy of another; divulging private message.

JUDICIAL DECISIONS

ANALYSIS

General Consideration

Telephone calls from jail.

Defendant's conversation with the defendant's attorney, made through a three-way call by the defendant's girlfriend and recorded at the jail, were admissible and not privileged under O.C.G.A. § 24-9-24 because the defendant's girlfriend remained on the call and the telephone had signs and a message indicating that calls could be recorded. Such a recording did not violate O.C.G.A. § 16-11-62 because that statute contained an express exception for recording jail calls. Rogers v. State, 290 Ga. 18, 717 S.E.2d 629 (2011).

Admission of audio only from videotape. — Trial court did not err in denying the defendant's motion for new trial because the defendant failed to show that a reasonable probability existed that the outcome of the case would have been different but for trial counsel's failure to file a motion to suppress videotaped evidence showing the drug sales transactions in the defendant's residence on the ground that the videotaping was done in violation of O.C.G.A. § 16-11-62; the defendant acknowledged that the audio recording of what transpired inside the home was admissible, even if the video portion of the tape inside the home had been excluded, and in addition to the audio tape of the transaction, an informant testified in detail about the events during the two buys and identified the defendant as the person who was present and participated in both buys. Durham v. State, 309 Ga. App. 444, 710 S.E.2d 644 (2011).

Because none of the types of communication encompassed by O.C.G.A. § 16-11-66(a) were at issue, because the parties stipulated that the video recordings the victim made between the victim and defendant without defendant's consent were in a private place, and because the participant's exception in § 16-11-66(a) applied to O.C.G.A. § 16-11-62 in its entirety, pursuant to O.C.G.A. § 16-11-67, the trial court properly excluded the recordings. State v. Madison, 311 Ga. App. 31, 714 S.E.2d 714 (2011).

Waiver of Right to Privacy

Emails of employees. — Trial court did not err in admitting into evidence an email because O.C.G.A. § 16-11-62 was not applicable; a former employer's president went into a former employee's office,

which was owned by the business of which the president was the chief executive officer and was used by the employee, who was under the president's authority, and there was no evidence that the president eavesdropped on the employee's conversations or secretly observed the employee's activities. Sitton v. Print Direction, Inc., 312 Ga. App. 365, 718 S.E.2d 532 (2011).

16-11-64. Interception of wire or oral transmissions by law enforcement officers.

JUDICIAL DECISIONS

ANALYSIS

APPLICATION

Application

Judges with jurisdiction over crimes can issue warrants for interceptions occurring outside jurisdiction. — Trial court properly denied the defendants' motions to suppress evidence officers obtained from intercepted telephone conversations resulting from a series of wiretap warrants, extensions, and amendments because the Georgia wiretap statute, O.C.G.A. § 16-11-64(c), authorized Gwinnett County Superior Court judges, who had jurisdiction over the crimes being investigated, to issue wiretap warrants for interceptions occurring outside of Gwinnett County. Luangkhot v. State, 313 Ga. App. 599, 722 S.E.2d 193 (2012).

16-11-66. Interception of wire, oral, or electronic communication by party thereto; consent requirements for recording and divulging conversations to which child under 18 years is a party; parental exception.

JUDICIAL DECISIONS

ANALYSIS

GENERAL CONSIDERATION

General Consideration

Telephone calls from jail.

Because none of the types of communication encompassed by O.C.G.A. § 16-11-66(a) were at issue, because the parties stipulated that the video recordings the victim made between the victim and defendant without defendant's consent were in a private place, and because the participant's exception in § 16-11-66(a) applied to O.C.G.A. § 16-11-62 in its entirety, pursuant to O.C.G.A. § 16-11-67, the trial court properly excluded the recordings. State v. Madison, 311 Ga. App. 31, 714 S.E.2d 714 (2011).

16-11-67. Admissibility of evidence obtained in violation of part.

JUDICIAL DECISIONS

Evidence properly excluded. — Because none of the types of communication encompassed by O.C.G.A. § 16-11-66(a) were at issue, because the parties stipulated that the video recordings the victim made between the victim and defendant without defendant's consent were in a private place, and because the partici-

pant's exception in § 16-11-66(a) applied to O.C.G.A. § 16-11-62 in its entirety, pursuant to O.C.G.A. § 16-11-67, the trial court properly excluded the recordings. State v. Madison, 311 Ga. App. 31, 714 S.E.2d 714 (2011).

ARTICLE 4

DANGEROUS INSTRUMENTALITIES AND PRACTICES

PART 1

GENERAL PROVISIONS

16-11-101.1. Furnishing pistol or revolver to person under the age of 18 years.

Law reviews. — For article, "Crimes and Offenses," see 27 Ga. St. U. L. Rev. 131 (2011).

16-11-102. Pointing or aiming gun or pistol at another.

JUDICIAL DECISIONS

Charge properly refused.

Defendant was not entitled to a jury charge on the misdemeanors of pointing a gun at another, O.C.G.A. § 16-11-102, as a lesser included offense of the felony counts of aggravated assault because the victims were placed in reasonable apprehension of immediately receiving a violent injury when the defendant pointed a gun at the victims; the only testimony was that the weapon was pointed as a threat and perceived as such and, therefore, an assault. Dailey v. State, 313 Ga. App. 809, 723 S.E.2d 43 (2012).

16-11-106. Possession of firearm or knife during commission of or attempt to commit certain crimes.

JUDICIAL DECISIONS

ANALYSIS

General Consideration

Evidence of possession sufficient.

Sufficient evidence showed the defendant committed possession of a firearm, under O.C.G.A. § 16-11-106(b), in the process of hijacking a victim's vehicle and committing an aggravated assault of the victim, because the defendant undisputedly possessed a handgun during the commission of these crimes and fled the scene. Campbell v. State, 314 Ga. App. 299, 724 S.E.2d 24 (2012).

Application

Felony requirement.

Offense of criminal damage to property in the first degree, pursuant to O.C.G.A. § 16-7-22(a)(1), involves a person, and thus may serve as a predicate for a conviction for possession of a firearm during the commission of a felony under O.C.G.A.

§ 16-11-106(b)(1). Craft v. State, 309 Ga. App. 698, 710 S.E.2d 891 (2011).

Jury was authorized to find defendant guilty, etc.

Jury's verdict of acquittal on an aggravated assault charge and guilty on the charge of possession of a firearm during the commission of a crime was not necessarily inconsistent because the jury was free to reject the defendant's testimony that the defendant did not know the defendant's passenger had a gun and accept the defendant's testimony that the defendant was unaware of the intended robbery. Morrell v. State, 313 Ga. App. 443, 721 S.E.2d 643 (2011).

Evidence sufficient to support conviction.

Evidence was sufficient to authorize a rational trier of fact to find the defendant guilty beyond a reasonable doubt of felony murder and possession of a firearm during the commission of a felony because the defendant and a codefendant began shooting across a street at someone, who returned fire, and the victim was an innocent 16-year-old bystander who was killed during the shootout. Norris v. State, 289 Ga. 154, 709 S.E.2d 792 (2011).

Evidence was sufficient to support a conviction for possession of a firearm during the commission of a felony under O.C.G.A. § 16-11-106(b)(1) since, while possessing a firearm, the defendant knowingly and without authority interfered with property in a manner endangering human life by shooting at an inhabited apartment building. Craft v. State, 309 Ga. App. 698, 710 S.E.2d 891 (2011).

Evidence was sufficient to support the defendant's conviction for malice murder, aggravated assault, conspiracy to commit armed robbery, and possession of a firearm during the commission of a crime because evidence was presented that the defendant and a codefendant entered a restaurant to rob the restaurant and shot two employees of the restaurant. In a statement to the police, the defendant admitted that the defendant entered the restaurant with a handgun to rob the restaurant, but the defendant claimed that the defendant heard gunshots and left the restaurant, while the codefendant gave a similar statement to the police. Watkins v. State, 289 Ga. 359, 711 S.E.2d 655 (2011).

Trial court did not err in denying the defendant's motion for a directed verdict after a jury found the defendant guilty of possession of a firearm during the commission of bus hijacking, O.C.G.A. § 16-11-106(b)(1), and possession of a firearm during the commission of aggravated assault, § 16-11-106(b)(1), because the defendant committed the substantive offenses of bus hijacking and aggravated assault with a handgun; therefore, the evidence was sufficient for a rational trier of fact to have found the defendant guilty beyond a reasonable doubt of possession of a firearm during the commission of the defendant's felony convictions. Cannon v. State, 310 Ga. App. 262, 712 S.E.2d 645 (2011).

Evidence of the circumstances was sufficient to establish the defendant's identity as the perpetrator and the defendant's guilt of armed robbery, O.C.G.A. § 16-8-41, aggravated assault, O.C.G.A. § 16-5-21, and possession of a firearm during the commission of a crime, O.C.G.A. § 16-11-106, because the defendant matched the description of the perpetrator given by both a convenience store clerk and another store employee; when the defendant was apprehended, an officer recovered next to the defendant's person the contraband and instrumentalities used in the commission of the robbery. Daniels v. State, 310 Ga. App. 562, 714 S.E.2d 91 (2011).

Because the victim's testimony was legally sufficient under O.C.G.A. § 24-4-8 to establish that the defendants assaulted the victim with intent to rob, the issue of which defendant actually held the weapon was immaterial; therefore, pursuant to O.C.G.A. § 16-2-20(a), the evidence was sufficient to find both the defendants guilty of aggravated assault with intent to rob and of possession of a firearm during the commission of a felony under O.C.G.A. §§ 16-5-21(a)(1) and 16-11-106. Clark v. State, 311 Ga. App. 58, 714 S.E.2d 736 (2011).

Trial court did not err in denying the defendant's motion for a directed verdict because the evidence was sufficient for a rational trier of fact to find the defendant

guilty beyond a reasonable doubt of distribution of marijuana, O.C.G.A. § 16-13-30(j), and possession of a firearm during the commission of a felony, O.C.G.A. § 16-11-106(b)(4); the testimony of a party to the transaction was corroborated by the observations of the detectives, the marijuana taken into evidence, the written statements of the parties regarding the defendant's involvement, and the defendant's own statement to a detective. Arnett v. State, 311 Ga. App. 811, 717 S.E.2d 312 (2011).

Evidence was sufficient to support the defendant's conviction for possession of a firearm during the commission of a crime, under O.C.G.A. § 16-11-106(b), because: (1) the perpetrator of a crime entered just before closing time a fast-food restaurant with a gun and directed the employees into a room, a cooler, and a freezer; (2) the perpetrator took money from the restaurant, shot one of the employees, and left the scene in the employee's car; (3) one of the employees telephoned relatives with a cell phone and told them what was happening; (4) the relatives called the police, came to the restaurant, and saw the perpetrator drive away; (5) money, a gun, and discarded clothing was recovered from the car or the area where the perpetrator fled on foot; (6) a police officer, who was pursuing the perpetrator, was wounded in an altercation with the perpetrator when the officer's gun discharged; (7) when the defendant later surrendered to the police, DNA from the officer's blood was found on the defendant's chest; and (8) the employees, the relatives, and the officer identified the defendant, a former employee of the restaurant who was fired days before the crime, as the perpetrator. Donald v. State, 312 Ga. App. 222, 718 S.E.2d 81 (2011).

Because the defendant pointed a gun at the victim while defendant's accomplices robbed the victim, and thereafter shot at the victim's trailer, hitting a child and killing the victim's sister-in-law, the evidence was sufficient to find the defendant guilty of felony murder, aggravated assault, armed robbery, cruelty to children, possession of a gun during the commission of a crime, and possession of a revolver by a person under the age of 18. Lytle v. State, 290 Ga. 177, 718 S.E.2d 296 (2011).

Jury was authorized to find the defendant guilty of voluntary manslaughter, O.C.G.A. § 16-5-2(a), aggravated assault, O.C.G.A. § 16-5-21(a)(2), possession of a firearm during the commission of a crime, O.C.G.A. § 16-11-106(b)(1), carrying a concealed weapon, O.C.G.A. § 16-11-126(b), and possession of a firearm by a convicted felon, O.C.G.A. § 16-11-131(b), because during an argument with the victims, the defendant shot the victims and threatened to kill the victims. White v. State, 312 Ga. App. 421, 718 S.E.2d 335 (2011).

Because the driver of a delivery truck was forced at gunpoint by the defendant's accomplice to drive a substantial distance to a secluded dirt road, and because the defendant followed the truck in another vehicle, pursuant to O.C.G.A. §§ 16-2-20 and 16-5-40(a), the evidence was sufficient to convict the defendant of kidnapping and possession of a firearm during the commission of a felony. Sipplen v. State, 312 Ga. App. 342, 718 S.E.2d 571 (2011).

Evidence was sufficient to authorize the defendant's convictions for hijacking a motor vehicle, in violation of O.C.G.A. § 16-5-44.1(b), armed robbery, in violation of O.C.G.A. § 16-8-41, aggravated assault, in violation of O.C.G.A. § 16-5-21(a)(2), and possession of a knife during the commission of a crime, in violation of O.C.G.A. § 16-11-106(b), based on the defendant's involvement as a party to the crimes, or as a coconspirator under O.C.G.A. § 16-2-20(b). The evidence presented was that: (1) when two people walked past the victim's parked vehicle, one of the people held a knife to the victim's stomach and ordered the victim to give the person the victim's wallet and keys; (2) the victim complied; (3) the person with the knife got into the driver's seat and the other person, who had stood nearby during the incident, got into the passenger seat; (3) the victim identified the defendant as the person who got into the passenger seat; (4) the people drove away, but were apprehended; (5) the victim's wallet was recovered, on the ground to the rear of the vehicle, on the passenger side; and (6) the victim, who was without money, wanted to leave the area because there was a warrant for the defendant's arrest. Harrelson v. State, 312 Ga. App. 710, 719 S.E.2d 569 (2011).

Rational trier of fact could have found beyond a reasonable doubt that the evidence was sufficient to establish that the defendant was guilty of aggravated assault, possession of a firearm during the commission of a felony, hijacking a motor vehicle, and armed robbery because there was ample evidence, based upon the defendant's actions and presence, companionship, conduct, and demeanor before, during, and after the commission of the crime, to conclude that the defendant was more than "merely present" during the commission of the crimes and was a party to the crimes pursuant to O.C.G.A. § 16-2-20; while in a car with the victim and companions, the front-seat passenger pulled out a gun and shot the victim, and during the incident, the defendant did not say or do anything to intervene. Cook v. State, 314 Ga. App. 289, 723 S.E.2d 709 (2012).

Murder, other offenses, and possession shown.

Trial evidence authorized the defendant's conviction for possession of a firearm during the commission of drug felony offenses as the defendant had immediate access to a handgun when the defendant and a co-defendant stood at the open trunk of a vehicle for approximately two or three minutes, depositing drugs in the defendant's bag, where the handgun was also located; the jury could conclude that the defendant had been within arm's reach of the handgun when the drugs and the handgun were placed together. Jackson v. State, 314 Ga. App. 272, 724 S.E.2d 9 (2012).

Robbery, other offenses, and possession shown.

Evidence was sufficient to sustain the defendant's convictions for armed robbery, O.C.G.A. § 16-8-41(a), aggravated assault, O.C.G.A. § 16-5-21, and possession of a firearm during the commission of a felony, O.C.G.A. § 16-11-106(b), because the victim testified about the assault and identified the defendant as the person who committed the assault; the competent testimony of even a single witness can be enough to sustain a conviction. Brown v. State, 314 Ga. App. 198, 723 S.E.2d 520 (2012).

Evidence insufficient to support conviction.

Evidence was insufficient to convict the defendant of possession of a knife during the commission of a felony in violation of O.C.G.A. § 16-11-106(b)(1), based upon the length of the blade of the knife because the length of the knife's blade was less than three inches long. Brown v. State, 313 Ga. App. 907, 723 S.E.2d 115 (2012).

Driving a getaway car sufficient for conviction. — Trial court had sufficient evidence to convict a defendant of armed robbery and possession of a firearm during the commission of a crime as a party to those crimes by aiding and abetting, pursuant to O.C.G.A. § 16-2-20, given evidence that the defendant helped plan the robberies of two game rooms, drove the getaway vehicle, and participated in the division of the proceeds. Norman v. State, 311 Ga. App. 721, 716 S.E.2d 805 (2011).

Punishment

Sentence exceeded statutory maximum. — Trial court's sentence of the defendant to life imprisonment for possession of a firearm during the commission of a felony was vacated because the sentence far exceeded the statutory maximum term-of-years sentence under O.C.G.A. § 16-11-106. Norris v. State, 289 Ga. 154, 709 S.E.2d 792 (2011).

Motion to withdraw guilty plea.

Trial court did not err in denying the defendant's motion to withdraw the guilty plea to armed robbery, O.C.G.A. § 16-8-41(a), aggravated assault with a deadly weapon, O.C.G.A. § 16-5-21(a)(2), cruelty to children in the first degree, O.C.G.A. § 16-5-70(b), and possession of a firearm during the commission of a felony, O.C.G.A. § 16-11-106(b)(1), because the state met the state's burden of showing that the defendant understood the constitutional rights the defendant was giving up by pleading guilty, that the defendant understood that since the plea was non-negotiated, the trial court would sentence the defendant to at least ten years imprisonment and could sentence the defendant to a maximum sentence of life in prison, and that the defendant knowingly and voluntarily entered the guilty plea in

order to avoid a trial on the indicted charges. Carson v. State, 314 Ga. App. 225, 723 S.E.2d 516 (2012).

Part 3

Carrying and Possession of Firearms

16-11-125.1. Definitions.

Law reviews. — For article, "Crimes and Offenses," see 27 Ga. St. U. L. Rev. 131 (2011).

16-11-126. Having or carrying handguns, long guns, or other weapons; license requirement; exceptions for homes, motor vehicles, and other locations and conditions; penalties for violations.

Law reviews. — For article, "Crimes and Offenses," see 27 Ga. St. U. L. Rev. 131 (2011).

JUDICIAL DECISIONS

Analysis

General Consideration

General Consideration

Evidence sufficient for conviction. Jury was authorized to find the defendant guilty of voluntary manslaughter, O.C.G.A. § 16-5-2(a), aggravated assault, O.C.G.A. § 16-5-21(a)(2), possession of a firearm during the commission of a crime, O.C.G.A. § 16-11-106(b)(1), carrying a concealed weapon, O.C.G.A. § 16-11-126(b), and possession of a firearm by a convicted felon, O.C.G.A. § 16-11-131(b), because during an argument with the victims, the defendant shot the victims and threatened to kill the victims. White v. State, 312 Ga. App. 421, 718 S.E.2d 335 (2011).

16-11-127. Carrying weapons in unauthorized locations; penalty.

Law reviews. — For article, "Crimes and Offenses," see 27 Ga. St. U. L. Rev. 131 (2011).

JUDICIAL DECISIONS

Application to places of worship. — When plaintiffs, a gun advocacy group and one of the group's members, and a church and the pastor, sought a declaratory judgment that O.C.G.A. § 16-11-127(b)(4), regulating possession of weapons in a place of worship, violated their First Amendment right to the free exercise of religion, because § 16-11-127(d)(2) only required leaving guns in vehicles or notifying security or management and following directions for securing guns under § 16-11-127(d)(2) and

(3), it was not an unmistakable pressure to forego religious precepts or pressure religious conduct to trigger scrutiny under the First Amendment's Free Exercise Clause and the claim against defendants, the State of Georgia, the Governor, a county, and a county manager failed. GeorgiaCarry.Org, Inc. v. Georgia, 764 F. Supp. 2d 1306 (M.D. Ga. 2011).

When plaintiffs, a gun advocacy group and one of the group's members, and a church and the pastor, sought a declaratory judgment that O.C.G.A. § 16-11-127(b)(4), regulating possession of weapons in a place of worship, violated their Second Amendment right to bear arms, the court noted that the United States Supreme Court, in District of Columbia v. Heller, 554 U.S. 570, 128 S. Ct. 2783 (2008), held that the Second Amendment protected a right to possess and carry weapons for self defense but did not elaborate on what all the "sensitive" places were to which a regulation could prohibit carrying a weapon, and absent clearer guidance, the safer approach was to assume that possession at a place of worship was within the Second Amendment guarantee and apply intermediate scrutiny, and since prohibiting firearms in a place of worship bore a substantial relationship to the important goal of protecting religious freedom by protecting attendees from the fear or threat of intimidation or armed attack, § 16-11-127(b)(4) passed intermediate scrutiny and the claim against defendants, the State of Georgia, the Governor, a county, and a county manager failed. GeorgiaCarry.Org, Inc. v. Georgia, 764 F. Supp. 2d 1306 (M.D. Ga. 2011).

16-11-127.1. Carrying weapons within school safety zones, at school functions, or on school property.

Law reviews. — For article, "Crimes and Offenses," see 27 Ga. St. U. L. Rev. 131 (2011). For article, "State v. Jackson and the Explosion of Liability for Felony Murder," see 62 Mercer L. Rev. 1335 (2011).

16-11-127.2. Weapons on premises of nuclear power facility.

Law reviews. — For article, "Crimes and Offenses," see 27 Ga. St. U. L. Rev. 131 (2011).

16-11-129. License to carry weapon; temporary renewal permit; mandamus.

Law reviews. — For article, "Crimes and Offenses," see 27 Ga. St. U. L. Rev. 131 (2011).

16-11-131. Possession of firearms by convicted felons and first offender probationers.

(a) As used in this Code section, the term:

(1) "Felony" means any offense punishable by imprisonment for a term of one year or more and includes conviction by a court-martial under the Uniform Code of Military Justice for an offense which would constitute a felony under the laws of the United States.

(2) "Firearm" includes any handgun, rifle, shotgun, or other weapon which will or can be converted to expel a projectile by the action of an explosive or electrical charge.

(b) Any person who is on probation as a felony first offender pursuant to Article 3 of Chapter 8 of Title 42 or who has been convicted of a felony by a court of this state or any other state; by a court of the United States including its territories, possessions, and dominions; or by a court of any foreign nation and who receives, possesses, or transports any firearm commits a felony and, upon conviction thereof, shall be imprisoned for not less than one nor more than five years; provided, however, that if the felony as to which the person is on probation or has been previously convicted is a forcible felony, then upon conviction of receiving, possessing, or transporting a firearm, such person shall be imprisoned for a period of five years.

(b.1) Any person who is prohibited by this Code section from possessing a firearm because of conviction of a forcible felony or because of being on probation as a first offender for a forcible felony pursuant to this Code section and who attempts to purchase or obtain transfer of a firearm shall be guilty of a felony and shall be punished by imprisonment for not less than one nor more than five years.

(c) This Code section shall not apply to any person who has been pardoned for the felony by the President of the United States, the State Board of Pardons and Paroles, or the person or agency empowered to grant pardons under the constitutions or laws of the several states or of a foreign nation and, by the terms of the pardon, has expressly been authorized to receive, possess, or transport a firearm.

(d) A person who has been convicted of a felony, but who has been granted relief from the disabilities imposed by the laws of the United States with respect to the acquisition, receipt, transfer, shipment, or possession of firearms by the secretary of the United States Department of the Treasury pursuant to 18 U.S.C. Section 925, shall, upon presenting to the Board of Public Safety proof that the relief has been granted and it being established from proof submitted by the applicant to the satisfaction of the Board of Public Safety that the circumstances regarding the conviction and the applicant's record and reputation are such that the acquisition, receipt, transfer, shipment, or possession of firearms by the person would not present a threat to the safety of the citizens of Georgia and that the granting of the relief sought would not be contrary to the public interest, be granted relief from the disabilities imposed by this Code section. A person who has been convicted under federal or state law of a felony pertaining to antitrust violations, unfair trade practices, or restraint of trade shall, upon presenting to the Board of Public Safety proof, and it being established from said proof, submitted by the applicant to the satisfaction of the Board of Public

Safety that the circumstances regarding the conviction and the applicant's record and reputation are such that the acquisition, receipt, transfer, shipment, or possession of firearms by the person would not present a threat to the safety of the citizens of Georgia and that the granting of the relief sought would not be contrary to the public interest, be granted relief from the disabilities imposed by this Code section. A record that the relief has been granted by the board shall be entered upon the criminal history of the person maintained by the Georgia Crime Information Center and the board shall maintain a list of the names of such persons which shall be open for public inspection.

(e) As used in this Code section, the term "forcible felony" means any felony which involves the use or threat of physical force or violence against any person and further includes, without limitation, murder; felony murder; burglary in any degree; robbery; armed robbery; kidnapping; hijacking of an aircraft or motor vehicle; aggravated stalking; rape; aggravated child molestation; aggravated sexual battery; arson in the first degree; the manufacturing, transporting, distribution, or possession of explosives with intent to kill, injure, or intimidate individuals or destroy a public building; terroristic threats; or acts of treason or insurrection.

(f) Any person placed on probation as a first offender pursuant to Article 3 of Chapter 8 of Title 42 and subsequently discharged without court adjudication of guilt pursuant to Code Section 42-8-62 shall, upon such discharge, be relieved from the disabilities imposed by this Code section. (Code 1933, § 26-2914, enacted by Ga. L. 1980, p. 1509, § 1; Ga. L. 1982, p. 1171, § 2; Ga. L. 1983, p. 945, § 1; Ga. L. 1987, p. 476, §§ 1, 2; Ga. L. 1989, p. 14, § 16; Ga. L. 2000, p. 1630, § 5; Ga. L. 2012, p. 899, § 8-5/HB 1176.)

The 2012 amendment, effective July 1, 2012, inserted "in any degree" near the middle of subsection (e). See editor's note for applicability.

Editor's notes. — Ga. L. 2012, p. 899, § 9-1(a)/HB 1176, not codified by the General Assembly, provides: "This Act shall become effective on July 1, 2012, and shall apply to offenses which occur on or after that date. Any offense occurring before July 1, 2012, shall be governed by the statute in effect at the time of such offense and shall be considered a prior conviction for the purpose of imposing a sentence that provides for a different penalty for a subsequent conviction for the same type of offense, of whatever degree or level, pursuant to this Act."

JUDICIAL DECISIONS

Analysis

General Consideration

General Consideration

Probable cause for arrest.

Trial court did not err in denying the defendant's motion to suppress evidence a police officer recovered from a rental car because the officer had reasonable grounds for detaining the defendant since

the officer found the defendant and a friend in the parking lot of a closed business late at night, knew that several burglaries and thefts had occurred in the area recently, and observed that the defendant and the friend appeared to be nervous when the officer spoke with them; in the course of securing a firearm the officer saw a firearm in the center console of the rental car, the officer saw in plain view a digital scale with white residue, affording the officer probable cause to effect a custodial arrest of the defendant. Culpepper v. State, 312 Ga. App. 115, 717 S.E.2d 698 (2011).

Constructive possession is sufficient to prove a violation.

Defendant's conviction of possession of a firearm by a convicted felon was proper because the act of any one of the conspirators involved was the act of all, and because the defendant's co-conspirator possessed a weapon, it followed that the defendant was in constructive possession of the weapon. Murray v. State, 309 Ga. App. 828, 711 S.E.2d 387 (2011).

Possession of firearms by convicted felons.

Evidence was sufficient to show that the defendant constructively possessed three firearms as a convicted felon in violation of O.C.G.A. § 16-11-131(b) because the defendant's bedroom contained two firearms and ammunition for a third gun that was found in a spare bedroom, and a shed the defendant used also contained ammunition for the guns. Layne v. State, 313 Ga. App. 608, 722 S.E.2d 351 (2012).

Evidence sufficient to sustain conviction.

Jury was authorized to find the defendant guilty of voluntary manslaughter, O.C.G.A. § 16-5-2(a), aggravated assault, O.C.G.A. § 16-5-21(a)(2), possession of a firearm during the commission of a crime, O.C.G.A. § 16-11-106(b)(1), carrying a concealed weapon, O.C.G.A. § 16-11-126(b), and possession of a firearm by a convicted felon, O.C.G.A. § 16-11-131(b), because during an argument with the victims, the defendant shot the victims and threatened to kill the victims. White v. State, 312 Ga. App. 421, 718 S.E.2d 335 (2011).

16-11-132. Possession of handgun by person under the age of 18 years.

Law reviews. — For article, "Crimes and Offenses," see 27 Ga. St. U. L. Rev. 131 (2011).

JUDICIAL DECISIONS

Evidence sufficient for conviction. — Because the defendant pointed a gun at the victim while defendant's accomplices robbed the victim, and thereafter shot at the victim's trailer, hitting a child and killing the victim's sister-in-law, the evidence was sufficient to find defendant guilty of felony murder, aggravated assault, armed robbery, cruelty to children, possession of a gun during the commission of a crime, and possession of a revolver by a person under the age of 18. Lytle v. State, 290 Ga. 177, 718 S.E.2d 296 (2011).

16-11-135. Public or private employer's parking lots; right of privacy in vehicles in employer's parking lot or invited guests on lot; severability; rights of action.

Law reviews. — For article, "Crimes and Offenses," see 27 Ga. St. U. L. Rev. 131 (2011).

16-11-136. Restrictions on possession, manufacture, sale, or transfer of knives.

(a) As used in this Code section, the term:

(1) "Courthouse" shall have the same meaning as set forth in Code Section 16-11-127.

(2) "Government building" shall have the same meaning as set forth in Code Section 16-11-127.

(3) "Knife" means any cutting instrument with a blade and shall include, without limitation, a knife as such term is defined in Code Section 16-11-125.1.

(b) Except for restrictions in courthouses and government buildings, no county, municipality, or consolidated government shall, by rule or ordinance, constrain the possession, manufacture, sale, or transfer of a knife more restrictively than the provisions of this part. (Code 1981, § 16-11-136, enacted by Ga. L. 2012, p. 1141, § 1/SB 432.)

Effective date. — This Code section became effective July 1, 2012.

ARTICLE 5

OFFENSES INVOLVING ILLEGAL ALIENS

Law reviews. — For article on the 2011 enactment of this article, see 28 Ga. St. U. L. Rev. 35 (2011).

For comment, "Immigration Detention Reform: No Band Aid Desired," see 60 Emory L. J. 1211 (2011).

16-11-200. Definitions; offense of transporting or moving illegal aliens; exceptions; penalties.

Law reviews. — For article, "State Government: Illegal Immigration Reform and Enforcement Act of 2011," see 28 Ga. St. U. L. Rev. 51 (2011).

OPINIONS OF THE ATTORNEY GENERAL

Fingerprinting required. — Offenses arising from a violation of O.C.G.A. § 16-11-200 are offenses for which fingerprinting is required. 2011 Op. Att'y Gen. No. 11-5.

16-11-201. Definitions; offense of concealing, harboring, or shielding an illegal alien; penalties; exceptions.

Law reviews. — For article, "State Government: Illegal Immigration Reform and Enforcement Act of 2011," see 28 Ga. St. U. L. Rev. 51 (2011).

OPINIONS OF THE ATTORNEY GENERAL

Fingerprinting required. — Offenses arising from a violation of O.C.G.A. § 16-11-201 are offenses for which fingerprinting is required. 2011 Op. Att'y Gen. No. 11-5.

16-11-202. Illegal alien defined; offense of inducing an illegal alien to enter state; penalties.

Law reviews. — For article, "State Government: Illegal Immigration Reform and Enforcement Act of 2011," see 28 Ga. St. U. L. Rev. 51 (2011).

OPINIONS OF THE ATTORNEY GENERAL

Fingerprinting required. — Offenses arising from a violation of O.C.G.A. § 16-11-202 are offenses for which fingerprinting is required. 2011 Op. Att'y Gen. No. 11-5.